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IN THE

Supreme Court of the United States

October Term, 1965

NO. [redacted] 116

NORMAN H. HELMS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on December 28, 1964. (Rehearing denied below [redacted] MARCH 8, 1965)

CITATION TO OPINION BELOW

The opinion delivered in the court below is reported in *340 F.2d 15*. It is appended. (Appendix B)

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 28, 1964. (Appendix B, p. 24). Rehearing was denied on March 8th, 1965. (Appendix B, p. 23). Mr. Justice Black, Supreme Court of the United States, on March 26, 1965, signed an order granting an extension of time within which to file petition for certiorari extending petitioner's time to and including May 7, 1965 (Appendix B, p. 25). The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

QUESTIONS PRESENTED

1. Whether the Trial Court shifted the burden of proof to the accused and deprived the accused of the presumption of innocence by charging the jury that it is reasonable to infer that a person ordinarily intends the natural and probable consequences of his acts and "unless the contrary appears from the evidence, the jury may draw the inference that the defendant intended all of the consequences which one standing in like circumstances and possessing like knowledge would reasonably have expected to result from any act knowingly done or knowingly omitted by the defendant." A subsidiary question is presented as to whether the practical effect of such an instruction is to coerce the accused into taking the stand in spite of the Fifth Amendment provision that "no person * * * shall be compelled in any criminal case to be a witness against himself."

2. Whether the petitioner was deprived of due process and a fair trial by the District Court's failure to meet the petitioner's objections to the court's instructions to the jury in failing to limit the consideration of unreported

gross income to those items contained in the Government's bill of particulars.

3. Whether petitioner was deprived of due process and a fair trial by the District Court's overruling the objections of the petitioner to the argument of the District Attorney wherein he accused the petitioner of extraneous offenses, and in particular, the corruption of a public official.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions, statutes and rules which this case involves are:

Amendment Five and Amendment Fourteen of the Constitution of the United States;

Title 26 U.S.C., §7206 (1);
Rule 7(f), Federal Rules of Criminal Procedure;
Rule 52, Federal Rules of Criminal Procedure.

Their pertinent text is set forth in Appendix A.

STATEMENT

The petitioner, Norman H. Helms, was tried under a two-count indictment, (R. 2 & 3) in the United States District Court of the Eastern District of Texas, Beaumont Division, both counts charging a violation of *Title 26, U.S.C., §7206 (1)*. Count one of the indictment charged the petitioner with wilfully and knowingly making and subscribing a United States individual Income Tax return which was verified by a written declaration that it was made under the penalties of perjury which the petitioner

did not believe to be true and correct as to every material matter in that the said Income Tax return stated his gross income to be $5,603.86, whereas he then and there well knew and believed he had understated his gross income on said Income Tax return. Count two charged the same violation for the year 1959 in reporting gross income of $21,527.33. The petitioner filed a motion for a bill of particulars (R. 6) and an amended motion for bill of particulars (R. 15) and the court granted said motion (R. 34) requiring the Government to file a bill of particulars setting forth the items of gross income which were not included in the petitioner's 1958 and 1959 Income Tax return.

Thereafter the Government filed a bill of particulars (R. 35) stating therein that the items of gross income alleged by the Government consisted of (a) unreported collections from marble tables of Jefferson Novelty Company; (b) unreported interest income and (c) unreported income from music machines. In explanation of these items the Government further set out that the principal source of unreported gross income consisted of omitted gross income from marble table collections and stated that they expected to introduce testimony of some twenty-three "location owners" that the collection tickets of Jefferson Novelty Company entered on the records of said company and the Income Tax returns of the petitioner were understated by a "substantial amount". The Government further alleged that the petitioner failed to report two items of interest income in the years in question received from a named party and further failed to report income from "background music rentals" for the year 1958. The jury returned a verdict finding the petitioner guilty on both

counts (R. 52) and the petitioner was sentenced to serve a period of 18 months on count one, two years on count two with sentence on count two to begin at the expiration of sentence on count one, and ordered to pay a fine of $2,500.00 on each of counts one and two, with the prison sentence imposed in count two suspended and the defendant placed on active probation for a period of five years to commence upon the expiration of sentence imposed as to count one (R. 53 & 54).

The Government relied primarily upon the testimony of a former employe, Buddy Borel, and various owners of business establishments where marble tables belonging to the petitioner's company were alleged to have been placed. It was the theory of the Government that the employe in making collections made two sets of tickets, one showing the true amount of receipts from the tables and the other showing a lesser amount. It was the further theory of the Government that the petitioner reported for the purpose of Income Tax returns the lesser amounts shown on the second set of tickets.

In support of the Government's allegations concerning interest income, the Government relied upon the witness, H. J. T. K. Fontenot, whose testimony was objected to by the petitioner because no proper predicate was laid for the introduction of the records on which said testimony was based. (R. 243). There was no evidence introduced from any source that the petitioner failed to report income from music machines.

The petitioner did not testify, but relied upon the failure of the Government to make out its case and presented no testimony from any source.

The Court, in instructing the jury, charged them as to the provisions of §7206 (1) of Title 26 *U.S.C.* (R. 567). He then proceeded to instruct the jury as to the charge against the petitioner by reading the two counts of the indictment and made no reference whatsoever to the bill of particulars and the allegations of the Government concerning said bill. He defined gross income as follows:

"*Section* 61a, *Internal Revenue Code*, 1954, 26 *U.S.C.*, 61a 1964 *Code*, provides in part as follows:

> 'Except as otherwise provided in this sub-title, gross income means all income from whatever source derived including, but not limited to, the following items: Compensation for services including fees, commissions, and similar items; 2. Gross income derived from business; 3. Gains derived from dealing in property; 4. interest; 5. Rent; 6 Royalties; 7. Dividends.'

Still later in his charge (R. 576) he instructed the jury again concerning gross income.

> 'In this case, the Government charges that the defendant understated his gross income in his 1958 income tax return and also his 1959 income tax return. 'Gross income' means all income from whatever source derived. In case of a merchandising business, gross income means the total sales less the cost of goods sold, plus any income from outside operations or sources. The government is not required to prove cost of goods sold and they rely upon the cost claimed by the defendant in this income tax return.
>
> 'Therefore, if you find from the evidence that the defendant understated his sales, that is, his receipts, or that he has understated his income from outside sources, such as interest income, the government has

> met its burden with respect to proving that the defendant understated his gross income.'"

By way of recapitulation the court again gave the jury the elements of the offense, but at no time limited their consideration of gross income to the items mentioned in the government's bill of particulars.

Among other objections made to the court's charge, the petitioner specifically objected to the failure of the court to instruct the jury (R. 585 & 586) that they should confine their consideration to the items alleged in the Government's bill of particulars on which there was proof in the record.

In addition to the above, the court charged the jury (R. 572 & 573)

> "It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So, unless the contrary appears from the evidence, the jury may draw the inference that the defendant intended all of the consequences which one standing in like circumstances and possessing like knowledge would reasonably have expected to result from any act knowingly done or knowingly omitted by the defendant. in determining this issue of intent the jury is entitled to consider any statement or acts done or omitted by the defendant, and all facts and circumstances in the evidence which may aid in its determination of the state of his mind."

During the Government's argument to the jury the following transpired:

"Do you believe in good law enforcement? Do you believe a man like Ted Helms who got his income the way the evidence in this case shows, who in order to operate, according to the evidence in this case, had to corrupt a public official—(interrupted)

MR. GOODWIN: Now, if Your Honor please, he is definitely going outside of the record in this case, and he is injecting a prejudicial matter in this case. He is being tried for false return on an income tax, and that evidence would not be admissible for any purpose; there's no evidence to that effect, and we are asking the court to instruct the jury to disregard it.

THE COURT: The objection will be overruled.

MR. GOODWIN: May I have a full bill on it, Your Honor?

THE COURT: Yes, sir.

MR. CORNETT (CONTINUING): Are you going to reward that kind of a man, and give him an award of thanks to put on his coat over his heart and say you have devised a scheme in our county here, Jefferson County, to go out of here and make your income in the manner that you've made it, and then flaunt the people of the United States of America by devising a scheme to escape your fair share and responsibility for the costs of this great government of ours?"

The Court of Appeals held that the failure to limit the jury to consideration of evidence supporting the bill of particulars was not error because there was no evidence in the record of unreported items that were not listed in the bill of particulars. This, in spite of the fact that the petitioner pointed out to the court that there was evidence erroneously admitted in reference to interest income and there was no way of determining from the jury's verdict

whether or not they had based their verdict on such inadmissible evidence.

The Court of Appeals further held that the charge on the inference of intent as well as the argument of the District Attorney harmless error.

REASONS FOR GRANTING THE WRIT

1. As to the first question presented herein the decision of the court below is in direct conflict with the decision of the Ninth Circuit Court of Appeals (1955), *Bloch v. U.S.*, 221 F.2d. 786 and is in direct conflict with the decisions of the Fifth Circuit in *Mann v. U.S.*, 319 F.2d 404 (1963); *Wardlaw v. U.S.*, 203 F.2d 884 (1953); and *Berkovitz v. U.S.*, 213 F.2d 468 (1954).

In addition the decision below is in conflict in principle with *Morissette v. U.S.*, 342 U.S. 246, 274 (1952), where the court says, "It follows that the Trial Court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act." The decision below is in conflict in principle likewise with the case of *Davis v. U.S.*, 160 U.S. 469, 487, 40 L.Ed. 499 wherein the court states, "The law clothes the accused with a presumption of innocence which he never loses until a verdict of conviction has been pronounced. He pleads nothing affirmatively, save in rare and exceptional instances, but by his plea of not guilty he puts upon the State the burden of establishing every fact necessary to constitute guilt. * * * Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution

from the beginning to the end of the trial and applies to every element necessary to constitute the crime."

The holding below is in further conflict in principle with *Smith v. U.S.*, 230 F.2d 935 (6 Cir., 1956) "Most important, in no condition of proof is it permissible to leave the jury the idea that it has become the duty of the defendant to establish his innocence to obtain an acquittal." See also *Perez v. U.S.*, 297 F.2d 12.

2. This first question presented herein embodies the serious question which has plagued the courts below as to instructions which shift the burden of proof from the prosecution to the defendant to prove lack of intent. Clearly this question should be settled by the Supreme Court due to the conflicts in decisions and because of the fact that such an instruction gives short shrift to the constitutional privilege against self-incrimination and denies the accused in practical effect, the right to exercise his constitutional privilege of remaining silent.

3. As to the first question presented, your petitioner respectfully submits in the alternative, that if this Honorable Court does not see fit to resolve the conflicts of the lower court, that this court should at least order an en banc hearing for the Fifth Circuit to resolve its conflicts in the *Mann, Wardlaw* and *Berkovitz* cases, supra.

4. As to the second question presented herein, the petitioner respectfully submits that the question presented is sufficiently important for the Supreme Court to review and calls for an exercise of the Supreme Court's supervisory powers in order to clarify procedurely the necessity for the Trial Court to limit the consideration of the jury to the allegations contained in the Government's bill of particulars

and to the evidence in support thereof. This question appears to be one of first impressions in Federal Jurisprudence, but further appears to be in direct conflict in principle with the holding of *People v. Davis*, (289 Ill. 256,) 110 NE 9 wherein the court said:

> "Counsel further complain of certain instructions of the people because they told the jury, in terms, that plaintiff in error, could be found guilty if they believed from the evidence that he had converted any money or property of Mrs. Cross, ignoring entirely any reference to the money and property specified in the bill of particulars. These instructions were misleading and erroneous in that regard. *When a bill of particulars has been filed in a case, the instructions should confine the consideration of the jury to the evidence supporting the charge contained in the bill of particulars.*" (Emphasis added).

5. As to the third question presented herein the decision of the court below is in direct conflict with *New York Central R. Co. v. Johnson*, 279 U.S. 310; *Hall v. U.S.*, 150 U.S. 76; *Graves v. U.S.*, 150 U.S. 118; *Wilson v. U.S.*, 149 U.S. 60.

Your petitioner would respectfully show that the lower court's holding in reference to the argument set out is in direct conflict with *Hall v. U.S.*, supra.

> "The presiding judge, by declining to interpose, notwithstanding the defendant's protest against this course of argument, gave the jury to understand that they might properly and lawfully be influenced by it; and therefore committed a grave error, manifiestly tending to prejudice the defendant with the jury, and which, therefore, was a proper subject of exception and, having been duly excepted to, entitled him to a new trial."

CONCLUSION

For the foregoing reasons, this petition for Writ of Certiorari should be granted; or, in the alternative, this Honorable Court should order an en banc hearing in the court below in order to resolve the conflicts between the decisions of said court.

Respectfully submitted,

Joe B. Goodwin

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CERTIFICATE OF SERVICE

A copy of this petition for writ of certiorari has been served upon the Honorable Wayne Justice, United States Attorney for the Eastern District of Texas, Attorney for the Respondent, by mailing a true copy thereof to him.

Joe B. Goodwin

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APPENDIX "A"

Amendment Five of the Constitution of the United States.

Amendment V - Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment Fourteen of the Constitution of the United States.

Amendment XIV - Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

* * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 26 U.S.C., §7206(1).

Title 26 U.S.C., §7206(1). Fraud and False Statements

(1) Declaration under penalties of perjury. - Willfully makes and subscribes any return, statement, or other document which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

Rule 7(f) Federal Rules of Criminal Procedure

Rule 7(f) Federal Rules of Criminal Procedure - The Indictment and the Information

(f) Bill of Particulars. The court for cause may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within ten days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice requires.

Rule 52 Federal Rules of Criminal Procedure, Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

APPENDIX "B"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20,748

NORMAN H. HELMS, *Appellant,*

versus

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the Eastern District of Texas.

(December 28, 1964.)

Before RIVES and BROWN, Circuit Judges, and NOEL, District Judge.

RIVES, Circuit Judge: The appellant-defendant was convicted on two counts of violating Section 7206(1) of the Internal Revenue Code of 1954, 26 U.S.C.A. 7206(1). Count 1 charged in substance that on January 29, 1959, the defendant willfully and knowingly made and subscribed a United States individual income tax return, verified by a written declaration that it was made under the penalties of perjury, in which, as he well knew and believed, he had understated his gross income. Count 2

made a like charge as to an income tax return made and subscribed on April 15, 1960.

A bill of particulars ordered on the defendant's motion restricted the charges as follows:

> "The principal source of unreported gross income consists of omitted gross income from marble table collections for the calendar years 1958 and 1959. The government expects to introduce in testimony of various location owners, among others, that the collection tickets of Jefferson Novelty Company entered on the books and records of Jefferson Novelty Company and reflected on the income tax returns of the defendant were understated by a substantial amount. Location owners to be called to testify include among others: [Here 23 names were listed.]
>
> "IV.
>
> ". . . the defendant failed to report interest income of $54.50 in 1958 and $640.00 in 1959 received from H. J. T. K. Fontenot.
>
> "V.
>
> ". . . the defendant failed to report income from background music rentals received from Leo Hebert in 1958 in the amount of $120.00.
>
> ". . . with the exception of the items hereinabove listed it does not intend to contest any other items of income or expense as reported on the defendant's 1958 and 1959 income tax return."

Appendix B — Helms v. United States

During the years in question, the defendant did business as Jefferson Novelty Company, which owned and operated juke boxes, shuffle boards, and pinball machines also called marble tables. These machines were operated by dropping coins in a slot, and were placed in such places as taverns, bars and restaurants under arrangements by which the money dropped in the juke boxes and shuffle board machines would be split fifty-fifty between the location owner and the defendant. The pinball machines or marble tables were used for a form of petty gambling and took in more money. If a player beat the game, an electrically operated meter would register the number of free games won, which the player could either use at once or for which he would be paid by the location owner at the rate of 5 cents per game. As to these pinball machines, the agreements were that the location owners would first be reimbursed for the amounts paid out as shown by the meter and then would be paid 40% of the remaining money taken in by the machine, leaving 60% of such remainder for the defendant.

During the years in question, one Albert Borel, an employee of the defendant, would call not less than once a week, and sometimes more often, on each of the various locations, "rob" the machines, and deliver to the location owner his share of the contents. Borel was the government's "star" witness. He testified that, on the defendant's instructions, he made two sets of records when he "robbed" the pinball machines. One set showing the true amounts would be signed by the location owner; the other showing fictitious lesser amounts, made up by Borel "out of his head," would also be signed by the location

owner. The location owner would be paid his 40% share of the winnings as shown by the true tickets, but would retain a copy of the false ticket only. Borel testified that he would sometimes check in to the defendant and sometimes to the bookkeeper and that he turned in both sets of records and all of the money that he had picked up.

Only seven of the twenty-three location owners listed in the bill of particulars were introduced by the government. They testified that their 40% share of the collections from the pinball machines ranged from $8.00 to $50.00 higher than the amounts shown on the false tickets.

The true tickets showed the meter readings of the pinball machines, but the false tickets did not. There was evidence from other witnesses that the false tickets which did not show the meter readings were the ones used in posting the defendant's books, and in making his income tax returns.

The government failed to prove the 1958 interest income of $54.50 as listed in its bill of particulars, but did offer proof as to part of the 1959 interest income of $640.00 so listed. Those interest items are extremely small as compared to the collections from the pinball machines. The government's evidence did not go beyond its bill of particulars. The defendant introduced no evidence other than his cross-examination of the government's witnesses.

In instructing the jury, the court made no reference to the bill of particulars. The defendant objected and insisted that the jury should be limited to a finding supported by items listed in the bill of particulars. The government does not quarrel with the proposition that

the effect of the filing of a bill of particulars is to confine the government to proof of the transactions there contained. It points out that there was no evidence tending to show defendant's receipt of unreported income except with respect to the matters listed in the bill of particulars; and that that was not true in the case relied on by the defendant, *People v. Davis*, 269 Ill. 256, 110 N.E. 9. "In the present case, there was no need to warn the jury not to consider evidence of unreported items not listed in the bill of particulars because there was no such evidence." Such an instruction may have been misleading or confusing to the jury, and the judge was well within the bounds of his discretion in refusing to so charge the jury.

In the course of his oral charge to the jury, the judge employed the following form or boiler-plate instruction:

> "It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So, unless the contrary appears from the evidence, the jury may draw the inference that the defendant intended all of the consequences which one standing in like circumstances and possessing like knowledge would reasonably have expected to result from any act knowingly done or knowingly omitted by the defendant. In determining this issue of intent the jury is entitled to consider any statement or acts done or omitted by the defendant, and all facts and circumstances in the evidence which may aid in its determination of the state of his mind."

That is the same instruction which this Court in *Mann v. United States*, 1963, 319 F.2d 404, 407-410, held to be plain error requiring reversal despite lack of objection.

The government earnestly argues that the charge is a correct statement of the law, that the *Mann* case was wrongly decided and should be overruled. It points also to the distinctions as to similar charges made both by this Court and by other courts. See *Sherwin v. United States*, 9 Cir. 1963, 320 F.2d 137, *cert. denied*, 375 U.S. 964; *Estes v. United States*, 5 Cir. 1964, 335 F.2d 609, 616; *United States v. Denton*, 6 Cir. 1964, 336 F.2d 785, 788; compare *Edwards v. United States*, 5 Cir. 1964, 334 F.2d 360, 366. We need not review the holding of the *Mann* case for, as we will show, that case is clearly distinguishable from the present case.

In holding that the giving of the instruction was plain error, we were careful to point out in *Mann* that "the sole defense of Dr. Mann was his contention that he did not intend to evade or defeat the tax imposed; and he denied that his conduct was willful or that he had any evil motive or intent to defraud." 320 F.2d at 410. The present case presents the opposite extreme. If the defendant actually instructed Borel to prepare the two sets of records and used the false tickets in making his income tax returns, there cannot be much doubt about his willfulness or criminal intent. While in both cases the government bore the burden of proving beyond a reasonable doubt the defendant's willfulness or criminal intent, in the *Mann* case the purely mental state was the crucial issue while here the contest centers about objective conduct, the preparation of two sets of records and the use of the false tickets in making defendant's income tax returns.

Appendix B — Helms v. United States

The defendant was represented by able counsel who carefully reserved many objections to the court's oral charge requiring some five pages of the typed record for their statement, but failed to object to this instruction. The ordinary rule is that, "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Rule 30, Fed. R. Crim. Proc. Most errors lie somewhere in-between those which are harmless[1] and those which are "plain error."[2] "Plain error" depends upon the peculiar facts and circumstances of each case. In the present case it does not appear that any error in giving the instruction affected substantial rights of the defendant, and any such error does not rise to the dignity of "plain error".

Three other claimed errors were argued for the first time in a supplemental brief filed by defendant on the morning of the oral argument. As the government points out, that is not within the time prescribed by Fifth Circuit Rule 24. However, we have considered those contentions and now discuss the only one which appears to have any substance.

One of the location owners testified, without objection, that the defendant had explained that the location owner

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[1] Where the **negative** is established that the error does not affect substantial rights. See 28 U.S.C.A. § 2111: Rule 52 (a), Fed.R.Crim. Proc.; Kotteakos v. United States, 1946, 328 U.S. 751, 764, 765.

[2] Where the **affirmative** is established that the error does affect substantial rights. See Rule 52 (b), Fed.R.Crim.Proc.

would get 40% of the pinball game receipts and the defendant would get 40%, and 20% would go to a Mr. Moore, the Assistant Chief of Police in Port Arthur, "And I said, 'Why to Mr. Moore?' and he said, 'Because we have to give friend.'" Defendant's counsel referred to that testimony in his oral argument to the jury as follows:

> ". . . 'Oh, this wealthy Ted Helms' is going to call a person like Bootsie McGee on the telephone and tell her, 'Oh, please, please, you're only getting 40%; I'm only getting 40% it's because Mr. Moore is getting 20%'. Boy, didn't Bootsie have fun. Didn't she love to sit in that chair? Wasn't she enjoying it?"

When his turn came, the Assistant United States Attorney responded as follows: "Do you believe in good law enforcement? Do you believe in a man like Ted Helms who got his income the way the evidence in this case shows, who in order to operate, according to the evidence in this case, had to corrupt a public official—(interrupted)."

At this point defendant's counsel objected and the court overruled the objection. While the issue was not pertinent and the argument should not have been made, it was nonetheless based on the evidence and was a fair response to the argument of defendant's counsel. The district court did not abuse its discretion in overruling objection to the argument.

We find no reversible error, and the judgment is

AFFIRMED.

APPENDIX "B"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 20,748

NORMAN H. HELMS, *Appellant,*

versus

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the Eastern District of Texas.

(March 8, 1965)

ON PETITION FOR REHEARING

Before RIVES and BROWN, Circuit Judges, and NOEL, District Judge.

PER CURIAM:

The petition for rehearing filed by the appellant in this cause is hereby

DENIED.

APPENDIX "B"

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1964

NO. 20748

D. C. Docket No. 5491-Cr.

NORMAN H. HELMS, *Appellant,*

versus

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the Eastern District of Texas.

Before RIVES and BROWN, Circuit Judges, and NOEL, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

December 28, 1964

Issued as Mandate:

APPENDIX "B"

Supreme Court of the United States

No. _____, October Term, 1964

NORMAN H. HELMS, *Petitioner*

vs.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including May 7th, 1965.

S/ HUGO L. BLACK
Associate Justice of the Supreme Court of the United States

Dated this 26th day of March, 1965.

APPENDIX "C"

BERNARD BLOCH, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

No. 14266.

United States Court of Appeals
Ninth Circuit.

April 11, 1955

Rehearing Denied June 14, 1955.
See 223 F.2d 297.

Before BONE and POPE, Circuit Judges, and MURRAY, District Judge.

MURRAY, District Judge.

Appellant was charged in the District of Arizona in two counts with attempting to evade or defeat the payment of income taxes owing by him for the years 1947 and 1948, in violation of Section 145(b), Title 26, U.S. C.A.[1] After trial by a jury in the District Court, appellant was acquitted on Count one (1947 taxes) and convicted on Count two (1948 taxes). He appeals, assigning three specifications of error.

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[1] Sec. 145(b). "Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

[1] The first specification of error relied on is that the District Court erred in failing to give appellant's requested instruction No. 2.[2] There is no merit in this specification of error as such. In the first place, the instruction as requested is at least misleading and confusing, if not clearly erroneous. Counsel for appellant attempted to take the instruction from the case of Gaunt v. United States, 1 Cir., 184 F.2d 284, 291, but omitted a portion of the last sentence of the instruction on wilfulness approved in the Gaunt case, supra. In the Gaunt case the last sentence of the instruction read:

> " 'He certainly is not wilful if he acts without the advice of a lawyer or accountant, for there is no requirement that a taxpayer, no matter how large his income, should engage a lawyer or an accountant.' "

Even that language, it seems to us, may be misleading because it might be subject to the interpretation that acting without advice of a lawyer or accountant shows a complete absence of wilfulness, and such is not the law.

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[2] The indictment in this case charges a violation of a willful attempt to evade or defeat a tax imposed by Section 145(b) of Title 26, United States Code. I instruct you that willfully "means knowingly, and with a bad heart, and a bad intent; it means having the purpose to cheat or defraud or do wrong in connection with a tax matter. It is not enough if all that is shown is that the defendant was stubborn or stupid, careless, negligent or grossly negligent. A defendant is not willfully evading a tax if he is careless about keeping his books. He is not willfully evading a tax if all that is shown is that he made errors of law. He is not willfully evading a tax if all that is shown is that he in good faith acted contrary to regulations laid down by the Bureau of Internal Revenue and the United States Department of Treasury. He certainly is not willful if he acts without advice of a lawyer or accountant."

What was meant to be said is that merely acting without advice of a lawyer or accountant does not itself prove wilfulness. But by omitting the explanatoin "for there is no requirement that the taxpayer engage a lawyer or accountant", which was contained in the Gaunt case, from the requested instruction in this case, the instruction became completely unacceptable, and it was not error for the trial Court to refuse it.

[2] Furthermore, the trial Court is not obliged to give an instruction in the exact language in which it is proposed, but may choose his own language. Wright v. U. S., 8 Cir., 175 F.2d 384; Nye & Nissen v. U. S., 9 Cir., 168 F.2d 846, affirmed 336 U.S. 613, 69 S.Ct. 766, 93 L.Ed. 919; Thayer v. U.S., 10 Cir., 168 F.2d 247; Petro v. U. S., 6 Cir., 210 F.2d 49. As the Court said in Wright v. U. S., supra:

> "Fortunately, a trial judge, in formulating his charge, is entitled to use his own language and is not required to let counsel for either party put words into his mouth. If the charge is accurate and gives to the jury all of the law which it needs in order to reach a verdict, that is enough." [175 F.2d 388.]

However, in examining the Court's charge to determine whether the jury was otherwise properly instructed as to the meaning of the word "willfully" as used in Section 145(b), Title 26, U.S. C.A., it becomes apparent that the charge was incorrect in several aspects, which will be hereinafter discussed.

[3] The appellant made no objection to the charge as given by the Court, but only objected to the failure of the

Court to give his requested instruction, nor did appellant raise in this Court any question regarding the correctness of the trial Court's charge on wilfulness. Whether the objection to the failure to give the offered instruction on wilfulness in the trial Court, and the specification of that failure as error in this court would be a sufficient saving of the point to permit this Court to consider other non-specified errors in the charge on wilfulness within the rule that Appellate Courts will not consider instructions to which no objections were taken at the time of trial need not be decided because of the provisions of Rule 52(b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., and cases decided thereunder. Rule 52(b) provides:

> "Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

The Supreme Court of the United States in U. S. v. Atkinson, 297 U.S. 157, 56 S.Ct. 391, 392, 80 L.Ed. 555, concerning this matter, said:

> "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings."

See also Morris v. United States, 9 Cir., 156 F.2d 525, 169 A.L.R. 305; U. S. v. Balodimas, 7 Cir., 177 F.2d 485; U. S. v. Perplies, 7 Cir., 165 F.2d 874; Fischer v. U. S., 10 Cir., 212 F.2d 441, 444.

The error of the trial court is, as we hereinafter point out, fundamental and goes to the very essence of the case so we must under the rule take notice of it.

[4] Proceeding then to a consideration of the Court's charge we find the trial Court instructed the jury in part as follows:

> "The attempt must be wilful, that is, intentionally done with the intent that the government is to be defrauded of the income tax due from the defendant."

That is a correct statement of the law, because the intent involved in the offense with which appellant here was charged is a specific intent involving the bad purpose and evil motive to evade or defeat the payment of his income tax. Wardlaw v. U. S., 5 Cir., 203 F.2d 884. However, the trial Court went on in his instruction, and in the very next sentence said:

> "The presumption is that a person intends the natural consequences of his acts, and the natural inference would be if a person consciously, knowingly and intentionally did not set up his income, and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax."

This is not a correct statement of law with regard to a criminal offense wherein specific intent is an essential element. Morissette v. U. S., 342 U.S. 246, 273, 72 S.Ct. 240, 96 L.Ed. 288; Wardlaw v. U. S., supra. As the Supreme Court said in the Morissette case, supra, 342 U.S. at page 275, 72 S.Ct. at page 256:

"We think presumptive intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary. Even congressional power to facilitate convictions by substituting puresumptions for proof is not without limit."

The conclusion sought to be supplied by presumption in the Morissette case was one of intent to steal casings, based upon the mere fact the defendant took them. What was said in that case applies equally to the case at bar where under the above portion of the trial Court's charge the jury was told in effect that they could draw the conclusion that the appellant had intended to defeat or evade the payment of his tax from the mere fact that he filed an incorrect income tax return.

The trial Court further instructed the jury as follows:

"Wilfully in the statute, which makes a wilful attempt to evade taxes a crime, refers to the state of mind in which the act of evasion was done. *It includes several states of mind, any one of which may be the willfulness to make up the crime.*

> *"Willfulness includes doing an act with a bad purpose. It includes doing an act without a justifiable excuse. It includes doing an act without ground for believing that the act is lawful. It also includes doing an act with a careless disregard for whether or not one has the right so to act."* (Italics supplied.)

We think that the italicized portion of the above instruction is erroneous in this case.

This portion of the Court's charge apparently was taken from the language of the Supreme Court in U. S. v. Murdock, 290 U.S. 389, at page 394, 54 S.Ct. 223, 226, 78 L.Ed. 381. The Murdock case was one in which defendant was indicted for refusal to give testimony and supply information as to deductions claimed in his tax returns for moneys paid to others in violation of Section 1114(a) of the Revenue Act of 1926 and Section 146(a) of the Revenue Act of 1928 which sections were identical. Those sections provided that:

> "Any person * * * required by law or regulations * * * to * * * supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this Act, who willfully fails to * * * supply such information * * * shall * * * be guilty of a misdemeanor."

When the Supreme Court there used the language which is embodied in the quoted portion of the trial Court's charge in this case, it was talking about how the word "wilfully" is variously defined under different statutes and circumstances. It is significant that in that case the Supreme Court, addressing itself to the particular case before it, said:

"The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense."

The Murdock case itself does not apply the definition of "wilfully" used by the trial Court in the instant Section 145(b) case.

[5] In this Section 145(b) tax evasion case there is only one state of mind that will supply the intent necessary to sustain a conviction, and that is the intent to defeat or evade the payment of the tax due. Nor would filing a false return with any bad purpose supply the necessary intent. The bad purpose must be to evade or defeat the payment of the income tax that is due. Nor would filing a false return without a justifiable excuse or without ground for believing it to be lawful or with a careless disregard for whether or not one has the right so to do constitute in themselves the intent which is required under the section. See Hargrove v. U. S., 5 Cir., 67 F.2d 820, 823, 90 A.L.R. 1276, wherein the Court discussed and distinguished the element of intent necessary under different statutes. See also U. S. v. Martell, 3 Cir., 199 F.2d 670.

These errors in the instruction are plain and affect substantial rights of the defendant and the fairness of the trial and require a reversal of the case.

[6] Appellant's second specification of error is that the Court erred in failing to properly instruct the jury with reference to certain questions asked by the prosecution. Appellant was asked questions as to whether he had ever

sworn that he had not sexual relations with named women, whether he had ever taken oath that he had not performed illegal operations, whether he had been refused a doctor's license and whether he had kept a mistress. Objections to these questions were made and properly sustained by the Judge who in this regard did everything requested of him by counsel for the defendant. The Judge would no doubt have given a more specific and detailed instruction advising the jury to disregard those questions and the implications arising therefrom had he been so requested.

Whether the instructions the Court did give in this connection were sufficient to protect the defendant need not now be decided inasmuch as the case must be reversed for the reasons already stated.

It is, however, appropriate to express our disapproval of the tactics employed by the government attorney in the prosecution of this case. The government on appeal sought to justify these prejudicial questions on the ground that the appellant had put his character in issue when he testified he was a member of the Junior Chamber of Commerce and that he had opened a skating rink to help deal with the problem of juvenile delinquency. We cannot agree that this testimony put appellant's character in issue. Furthermore, some of the questions concerning the appellant keeping a mistress were asked of witnesses before appellant ever took the stand.

The appellant was on trial on the charge of attempting to evade or defeat the payment of his income tax. His guilt or innocence of that charge was the only issue in the case and the questions asked, above referred to, were

not relevant in any way to that issue and could only serve to paint the appellant as a scoundrel in the eyes of the jury. The practice of attempting to convict a defendant not of the crime of which he is charged, but rather of being an all round, no good dissolute person, is foreign to our system and is disapproved by this Court.

Appellant's third specification of error is that the jury brought in conflicting verdicts on counts one and two. There is no merit in this specification.

The cause is reversed and remanded for a new trial on Count two of the indictment.

APPENDIX "C"

NATHAN MANN, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

No. 19544.

United States Court of Appeals
Fifth Circuit.

June 25, 1963.

Rehearing Denied Oct. 10, 1963.

Before HUTCHESON, WISDOM and GEWIN, Circuit Judges.

GEWIN, Circuit Judge.

This is an appeal from a judgment of conviction entered upon a jury verdict finding appellant, Nathan Mann, M.D., guilty of wilfully attempting to defeat or evade payment of income taxes owed by him and his wife for the years 1954, 1955 and 1956, in violation of 26 U.S.C.A. §7201.[1] Dr. Mann was indicted on three counts, each involving one of the years in question. He contends that the evidence against him was insufficient to sustain the conviction, and that the instructions on wilfulness in the oral charge of the trial judge were fundamentally erroneous. Doctor Mann resided in Corpus Christi, Texas, where he con-

[1] This statute provides as follows: "[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

ducted a general medical practice treating patients both in and out of his office.

The Government contends that for each year in question the unreported taxable income of Dr. Mann was reflected in two ways. First, there were amounts of unreported income reflected by his bank deposits; and second, that unreported income was reflected by bond purchases made by Dr. Mann with money not taken from his bank account. While admitting the existence of the unreported taxable income as reflected by his bank deposits, Dr. Mann denies that he wilfully omitted income from his return, and contends that such omission was due to the inefficiency and negligence of his accountant.

[1] As to the money used for buying the bonds, Dr. Mann claims, and this is corroborated by his wife, that the money came from cash gifts chiefly[2] from his father, and therefore, his omission of this money was not wilful evasion since these claimed gifts were not taxable. The jury did not accept his explanation, but found him guilty as charged. As to Dr. Mann's first contention, we hold that there was sufficient evidence of his guilt to support the jury's verdict, and the refusal to grant the motion for acquittal was not error.

Doctor Mann's bookkeeping system consisted of the maintenance of three separate books of entry including a "Daily Log" in which cash payments on account and the charges to patients' accounts were recorded; a "Journal" kept as a single entry book, to which were posted from

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[2] Some gifts from others were also claimed, including Dr. Mann's father-in-law.

the Daily Log receipts from patients, deposits to the bank account and checks drawn thereon; and a subsidiary ledger also showing charges to patients' accounts and their payments made against these charges, these figures also being taken directly from the Daily Log.

The Daily Log, according to Otto Kuehn, the accountant who did Dr. Mann's tax work, was the core of the doctor's accounting system. The failure to note a transaction or collection in the Daily Log would inevitably lead to its not being reported in Dr. Mann's income tax. There was testimony that Dr. Mann usually made the collections and reported them to the bookkeeper for posting in the Daily Log; and in many instances he posted the collections himself.

Certain exhibits introduced by the Government show that Dr. Mann made up the bank deposits, put them in the bank himself and the secretary posted the totals from the deposit slips as a credit to the Journal "Cash" account and a debit to the Journal "Bank" account. The "Fee" column from the Journal and data on rent, dividends and interest, separately supplied by Dr. Mann himself, were the sources of information from which Accountant Kuehn prepared the tax returns. The accountant, having no knowledge of the substance of the transactions reflected in the Daily Log as posted to the Journal, depended entirely upon information supplied by Dr. Mann or his office.

A special agent of the Internal Revenue Service began investigating Dr. Mann's accounts on February 25, 1958. The agent obtained the Journals, Daily Log, some other materials and familiarized himself with the internal pro-

cedures of Dr. Mann's medical office. This agent contacted thirty-five of Dr. Mann's patients of which six or eight furnished him with a reasonably complete record of their cash payments to Dr. Mann. In all cases the amount that the patient had actually paid was higher than the amount shown to have been paid and recorded on the Daily Log. Then the agent analyzed Dr. Mann's bank deposits and came to the conclusion that his income tax returns did not reflect his true income.

A recent case by this court dealing with the sufficiency of the evidence to establish wilfulness in income tax cases is Windisch v. United States, 5 Cir., 1961, 295 F.2d 531. Windisch contended that tax evasion cannot be established merely by showing that the taxpayer failed to include items of income in his return. The Court said in affirming:

> "The principle is correctly stated, but these cases are distinguishable from the instant case. Unlike Pechenik [United States v. Pechenik, 3 Cir., 236 F.2d 844], for example, Windisch omitted specific items of income earned, the accountant was not engaged to make an audit, and the accountant relied upon Windisch to supply the necessary tax information as to income as well as to expenditures. The appellant can point, as defendants have done in similar cases, to the lack of certain badges of fraud. That is not enough. The question of wilfullness is for the jury. Considering the record as a whole, the evidence which was direct as well as circumstantial, supports the verdict and the judgment of the district court."

As in Windisch, the evidence in this case was sufficient to make out a case for the jury and the jury decided the question of wilfulness.

Appendix C — Mann v. United States

The Government introduced evidence both direct and circumstantial to show that the bonds in question were purchased by money received from Dr. Mann's patients. The evidence was clear that Dr. Mann purchased more than $15,000.00 worth of bonds during the years in question. However, when he was questioned about the bonds by Internal Revenue Agent Moore, he could only remember purchasing two $500.00 Series "E" Savings Bonds during the years in question. It was Dr. Mann's contention that he bought the bonds from money received as a gift from his father. At the trial, the Gift Tax Returns filed by Samuel Mann, Dr. Mann's father, were introduced into evidence. They showed gifts to Oscar Mann, Dr. Mann's brother, but none to Dr. Mann himself. The bank employee from whom the bonds were purchased testified that Dr. Mann purchased the bonds with crumpled currency taken from his pockets, and with checks from third persons which he endorsed. While this evidence may not be conclusive proof of wilfulness, it was sufficient to present a jury question as to whether or not the bonds were purchased with cash gifts or unreported taxable income.

A far more complex problem is raised by Dr. Mann's second contention, which relates to the following portion of the Court's oral charge:

> "It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have

expected to result from any act knowingly done or knowingly omitted by the accused."

No objection was made to the charge when given; but it is contended that it is so plainly erroneous that this court should notice the error under rule 52(b) F.R.Crim.P. The Government does not seriously contend that the above quoted portion of the charge, standing alone, is not erroneous. It claims that other portions of the charge rectified any error committed; and when the charge is read as a whole, the issue of wilfulness was fairly presented to the jury. The entire portion of the court's charge relating to wilfulness is printed in the margin.[3]

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[3] "In every crime there must exist a union of joint operation of fact and intent. The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt. Specific intent must be proved before there can be a conviction. Specific intent as the term itself suggests, requires more than a mere general intent to engage in certain conduct. A person who knowingly does an act which the law forbids, or knowingly fails to do an act which the law requires, intending with evil motive or bad purpose either to disobey or to disregard the law, may be found to act with specific intent. An act or failure to act is done knowingly if done voluntarily and purposely, and not because of mistake or inadvertence or other innocent reason.

"In considering the defendant's guilt or innocence you are instructed that it must be shown beyond a reasonable doubt that the defendant, Nathan Mann, willfully and knowingly attempted to evade taxes as charged in Counts One, Two and Three, considering each count separately, with a specific intent to evade such taxes. In our law such specific intent means more than intentional or voluntary filing of a return that may be shown to be incorrect or false, if there were any such returns filed, for it must be shown beyond a reasonable doubt that such filing was accompanied by an evil motive and wrong purpose. Otherwise, you should find him innocent.

"If you find that the defendant, Nathan Mann, acted in good faith in filing one or all of such returns as described in the indict-

Dr. Mann argues that the effect of that portion of the charge of which he complains was to make the jury aware of a certain factual hypothesis and to instruct them that if they believed this hypothesis was established by the evidence, they were then authorized, absent opposing evidence, to infer that Dr. Mann's intent was tax evasion. This, he contends, is tantamount to an incriminating presumption which the jury, absent opposing evidence, could use as a substitute for proof. We agree.

In Morrissette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952), the defendant, while hunting

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ment, you shall find him not guilty as to the one or all of such counts, considering each separately, which were accompanied by such good faith, if any.

"The intent involved in this offense and required to be shown is not proved merely by filing a return that is false, but requires the specific intent on the part of the defendant involving bad purpose and evil motive, and that specific intent must be clearly inferred from the evidence and you must so find from the evidence beyond a reasonable doubt.

"Intent may be proved by circumstantial evidence. It rarely can be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eye-witness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.

"It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

"In determining the issue as to intent, the jury is entitled to consider any statements made and acts done or omitted by the accused, and all facts and circumstances in evidence which may aid in determining state of mind."

on a government bombing range, carried away and sold three tons of used bomb casings. He was prosecuted for knowingly converting government property to his own use. The trial court refused to submit the question of wilfulness to the jury, holding that such intent was "presumed" from the defendant's act. In reversing the conviction, the court stated:

> "We think presumptive intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary. Even congressional power to facilitate convictions by substituting presumptions for proof is not without limit."

Identical charges, strikingly similar to the charge under consideration in the instant case, were involved in three cases, two of which were decided by this court. Berkovitz v. United States, 5 Cir., 1954, 213 F.2d 468; Wardlaw v. United States, 5 Cir., 1953, 203 F.2d 884; Bloch v. United States, 9 Cir., 1955, 221 F.2d 786. In all three cases the court charged:

> "The presumption is that a person intends the natural consequences of his acts, and the natural presumption would be if a person consciously, knowingly, or intentionally did not set up his income and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax."

Convictions in all three cases were reversed on appeal. The opinions held that the effect of the charge was to tell the jury that it could draw the conclusion that the defendant intended to defeat the payment of the tax from the mere fact that an incorrect return was filed; and resulted in a shifting of the burden of proof from the Government to the defendant. As stated in Berkovitz with reference to the charge:

> "It had, of course, told the jury in other parts of the charge that the defendant was presumed to be innocent until proved guilty beyond a reasonable doubt with full elucidation of what this meant. However, the error was in telling them that as a matter of law they could presume criminal intent from the circumstances described in the questioned charge, without at the same time telling them they must consider all the evidence including that offered by defendant to disprove that intent, that the burden of proof never shifted and the Government, in spite of those circumstances, was required to prove the guilt of defendant beyond a reasonable doubt."

[2] The instructions in the instant case go beyond the bounds of the charge set out in the above cited cases. If the charge had ended when the jury was told that a person is presumed to intend the natural consequences of his own acts, when considered in the light of the charge as a whole,

there would have been no error. When the words, "So unless the contrary appears from the evidence" were introduced, the burden of proof was thereupon shifted from the prosecution to the defendant to prove lack of intent. If an inference from a fact or set of facts must be overcome with opposing evidence, then the inference becomes a presumption and places a burden on the accused to overcome that presumption. Such a burden is especially harmful when a person is required to overcome a presumption as to anything subjective, such as intent or wilfulness, and a barrier almost impossible to hurdle results.

[3] The quoted charge is subject to another vice. The statute involved, 26 U.S.C.A. §7201, specifically provides that the crime of income tax evasion must be accompanied by a specific intent on the part of the accused to defeat or evade the tax, which must be proved by independent evidence. Spies v. United States, 317 U.S. 492, 63 S.Ct. 364, 87 L.Ed. 418 (1943). Under the instruction here involved, the jury is invited to speculate as to what any other person similarly situated to Dr. Mann and with like knowledge, would reasonably have expected to be the consequences of the conduct under consideration as shown by the evidence. The test is whether Dr. Mann himself wilfully attempted to evade or defeat the tax. The following charge was condemned in Chappell v. United States, 9 Cir., 1959, 270 F.2d 274.

> "Criminal intent is a necessary ingredient of the crime charged in the indictment, and before a verdict of guilty may be rendered you must find from the evidence, beyond a reasonable doubt, that the defendant intended to commit the offense against

> the United States charged in the indictment. In this connection, you are instructed that every person is presumed to intend the natural consequences of his own voluntary and deliberate acts. One who voluntarily and deliberately performs an act which, from our common experience, is known to produce a particular result, may be presumed to have anticipated and intended that result."

The Court held that the quoted charge conflicted with the overriding presumption of innocence with which the accused is endowed under the law.

Our attention is called to the case of Bernstein v. United States, 5 Cir., 1956, 234 F.2d 475, in which it was said that every charge of a presumption other than that of innocence is not reversible error in a criminal trial. It is not our holding that every charge using the word "presumption" is reversible error. We do hold that it is error to give a charge in a criminal case of this nature, the overall effect of which is to place a burden upon the defendant to produce evidence to overcome a presumption of guilt.

[4, 5] We are not unmindful of the case of Legatos v. United States, 9 Cir., 1955, 222 F.2d 678, and Windisch v. United States, supra, which hold that when a charge as a whole fairly gives the law to the jury on the necessity of wilfulness in an income tax evasion case, that one isolated part of the charge that a person is presumed to intend the natural consequences of his acts, does not constitute prejudicial error. Even though the trial judge did give an accurate charge on the necessity of intent and the burden of proof, we hold that to leave the jury

with that part of the charge complained of in this case was not cured by what was said elsewhere in the charge. Instructions to the jury must be consistent and not misleading. The fact that one instruction is correct does not cure error in giving another inconsistent one. Perez v. United States, 5 Cir., 1961, 297 F.2d 12.

[6] Counsel for Dr. Mann did not object to the charge as required by Rule 30 F.R.Crim.P. The sole defense of Dr. Mann was his contention that he did not intend to evade or defeat, the tax imposed; and he denied that his conduct was wilful or that he had any evil motive or intent to defraud. We think that an error affecting such a vital aspect of the case is fundamental. Rule 52(b) F.R.Crim.P. provides:

> "Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

As stated in Bloch: "The error of the trial court is * * * fundamental and goes to the very essence of the case so we must under the rule take notice of it". As emphasized in Perez, it is never permissible to leave the jury with the idea that it becomes the duty of the defendant to establish his innocence. The charge in this case could very well have had that effect, and as such, we cannot allow the conviction to stand.

For the foregoing reasons, the judgment of conviction on all three counts is reversed and the case is remanded for a new trial.

APPENDIX "C"

WARDLAW v. UNITED STATES.

No. 14105.

United States Court of Appeals
Fifth Circuit.

April 17, 1953.

Before HUTCHESON, Chief Judge, and HOLMES and RIVES, Circuit Judges.

RIVES, Circuit Judge.

The appellant was convicted of willfully and knowingly attempting to defeat and evade a large part of the income tax due and owing by him and his wife for the years 1948 and 1949, 26 U.S.C.A. § 145(b).[1] The appellant admitted that he failed to report the larger portion of his income and reported only his salary as Assistant District Attorney of Tarrant County, Texas. He denied that his conduct was willful or that he had any evil motive or intent to defraud, and insisted that he acted under a *bona fide* misconception of the income tax law. In wholly failing to report his fees from private law practice, he

[1] "(b) **Failure to collect and pay over tax, or attempt to defeat or or evade tax.** Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

claimed that he thought his deductions would more than offset those fees and that it was not necessary to report them. It was further his understanding, so he claimed, that income invested in capital assets need not be reported until the property was sold.

[1] It is now settled that "willfully", as used in this offense, means more than intentionally or voluntarily, and includes an evil motive or bad purpose, so that evidence of an actual *bona fide* misconception of the law, such as would negative knowledge of the existence of the obligation, would, if believed by the jury, justify a verdict for the defendant.[2]

[2-4] Claimed ignorance, however, could hardly be established so conclusively as to justify a directed verdict. It seems to be conceded that the appellant intentionally, though (he claims) mistakenly, failed to include a large part of his income in his return. That is more than the mere failure to return income and pay the tax on it held insufficient to constitute the offense of willfully attempting to defeat and evade the income tax in Jones v. United States, 5 Cir., 164 F.2d 398.[3] Further, the Government

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[2] United States v. Murdock, 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381; Hargrove v. United States, 5 Cir., 67 F.2d 820, 90 A.L.R. 1276; Haigler v. United States, 10 Cir., 172 F.2d 986; Battjes v. United States, 6 Cir., 172 F.2d 1; Gaunt v. United States, 1 Cir. 184 F.2d 284; Balter, Fraud Under Federal Tax Law, Sec. 18, p. 37, Sec. 158, p. 267 and Sec. 161 pp. 269-271.

[3] Jones v. United States, supra, was based upon Spies v. United States, 317 U.S. 492, 63 S.Ct. 364, 87 L.Ed. 418, where the Supreme Court drew the distinction between the misdemeanor of willfully failing to make a return and pay the tax, section 145(a), and the felony of willfully attempting to evade or defeat the tax, see § 145(b). To commit the felony requires some affirmative action

offered evidence from which the jury might have concluded that appellant's return for a previous year, and his treatment of income from sales of other assets were inconsistent with his claimed misconception of the law; and the Government insists with some force that appellant's conduct in reporting only his salary as a public official was because he knew that that salary was a matter of public information. It was for the jury to say whether the appellant had the requisite criminal intent, that is whether he willfully and knowingly attempted to defeat and evade income tax. See United States v. Johnson, 319 U.S. 503, 63 S.Ct. 1233, 87 L.Ed. 1546; Schuermann v. United States, 8 Cir., 174 F.2d 397.

[5-8] The defense in this case was founded entirely on a denial of the necessary criminal intent. The comments and remarks of the court[4] in the presence of

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implied from the term "attempt". Willfully making a false return may constitute that affirmative action and is to be distinguished from a mere omission to make any return. Indeed, under section 145(c), the making of a willfully false return in and of itself constitutes a felony.

[4] "Counsel, aren't you in this attitude, suppose I am a country boy, and driving an automobile up and down the country roads and never seen a red light, but drive into Dallas, and run a red light, I didn't know I was doing wrong, and that fact would be a mitigating circumstance that the traffic regulations should consider, perhaps, or —

* * * * * * * *

"I know there is bound to be, there is a line of demarcation there, else, a cannibal could eat his neighbor's children, and believe it is all right.

* * * * * * * *

"I think if you are practicing before a State Jury, that is going to assess the penalty. This Jury is not going to assess the penalty.

* * * * * * * *

"I think your situation, Counsel, is, that you, in your effort to show good faith, are endeavoring to show that the Defendant did

the jury would have had no effect other than to impress the jury with the belief that there was no good faith defense. Further, the court, after telling the jury that the attempt to defeat and evade the tax must be willfully and intentionally done, charged as follows:

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not know what the tax law was, and therefore, he intentionally did no wrong. Now, that, we do think, would be mitigating in the way of penalty, but we do not think it would excuse him on the question of guilt or innocence.

* * * * * * * *

"I cannot follow your deduction, except that the honest belief of a man, if he is sincere, would wipe out even the criminal statutes of the country.

* * * * * * * *

"I think you can show just what occurred, and you might go even to the point of arguing that, since he was not intending to do these things, that maybe he should have some consideration in that respect, just as a man's good reputation is entitled to be considered. But, I don't think you can go to the point, Counsel, of showing that a man did not know he was doing wrong.

* * * * * * * *

"I would not refuse to let you present them, but I still say that—it would be something new to me, if a man can be excused for violating the law, because he did not know he violated it.

* * * * * * * *

"I think, Counsel, the matter is virtually covered by the same question we had up awhile ago, that a man cannot just say that, 'I did not know I was doing wrong', and thereby avoid the responsibility; he may offer it as tending to lessen the punishment, but, since this Jury does not pass on the punishment, I don't see how it could be admissible. The Court will hear you, if a question of law arises, whereby he must act without the law being offered in evidence.

* * * * * * * *

"Then, would you be in the position of having to prove the truthfulness of your statement, when he said he did not know it was wrong to run it?

* * * * * * * *

"I will let you have the evidence on everything that transpired, and I will let you argue it, I don't think I could let the record be made a man did not know he was breaking the law."

"The presumption is that a person intends the natural consequences of his acts, and the natural presumption would be if a person consciously, knowingly, or intentionally did not set up his income and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax."

The appellant duly excepted to this charge. We think the exception was good and the giving of this charge was prejudicial error. The intent involved in this offense is not inherent in the act itself, but is a specific intent involving bad purpose and evil motive and that specific intent must be proved by or clearly inferred from the evidence. See authorities Footnote 2, supra.[5]

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[5] In a recent case of stealing Government property, 18 U.S.C.A. § 641, where the district judge had said "That [felonious intent] is presumed by his own act", the Supreme Court used the following forceful language:

"We think presumptive intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary. Even congressional power to facilitate convictions by substituting presumptions for proof is not without limit. Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519." Morissette v. United States, 342 U.S. 246, 275, 72 S.Ct. 240, 243, 256, 95 L.Ed. 288.

It has been well said by the Ninth Circuit in Hubbard v. United States, 79 F.2d 850, 853: "An intent to defraud cannot be presumed from an unlawful act which does not naturally bespeak fraud.

We find it unnecessary to pass upon the other specifications of error. The judgment of conviction is reversed and the cause remanded for a new trial.

Reversed and remanded.

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* * * The color of the act determines the complexion of the intent only in those situations where common experience has found a reliable correlation between a particular act and a corresponding intent."

Even when not reversible error, "The use of the words 'presume' or 'presumption' in this connection is not to be approved." Grayson v. United States, 8 Cir., 107 F.2d 367, 370.

APPENDIX "C"

BERKOVITZ v. UNITED STATES.

No. 14493.

United States Court of Appeals
Fifth Circuit.

May 31, 1954.

Before STRUM and RIVES, Circuit Judges, and DAWKINS, District Judge.

DAWKINS, District Judge.

Appellant was convicted and sentenced on a charge of "attempting to defeat and evade income taxes" for the year 1946, under Section 145(b), Title 26 United States Code, of the Internal Revenue Code.

Defendant's assignments of error are in substance as follows:

1. That the court erred in charging: "The presumption is that a person intends the natural consequences of his conscious acts, and a natural presumption would be if a person consciously, knowingly, or intentionally did not set up his income, and thereby the Government was cheated or defrauded of taxes, that he intended to defeat the tax.";

2. In refusing to give appellant's charges Nos. 8, 14 and 16, "or any one of them";

3. (1) In excluding evidence of the subsequent payment of the taxes or a considerable part thereof, and (2) then charging the jury that it could consider whether defendant had discharged his tax liability in determining his criminal intent;

4. "Is proof that the defendant failed to include certain items of income in his income tax return sufficient—standing alone—to sustain a verdict of guilty of the felony defined in Sec. 145(b) of the Internal Revenue Code?";

5. In further charging: "It is for you to determine from all of the evidence whether the defendant has knowledge of the falsity of this return, provided you also find that the return was false."; and

6. The court abused its discretion (1) in denying appellant's motion for a bill of particulars, and (2) in overruling his motion for a new trial, based upon alleged newly discovered evidence, which could only have been ascertained had the motion for particulars been granted.

The two principal alleged errors which we shall first consider are No. 1, dealing with the charge first quoted above, and No. 3, the excluding of evidence by defendant to show he had paid a substantial part of the taxes he was charged with attempting to evade and defeat, and later charging the jury they might consider the failure to pay as bearing upon his intent.

It was conceded by defendant that he had not reported all of his income for the calendar year 1946, and the sole issue was as to whether this had been done wilfully and intentionally, with knowledge of the relevant facts, for the purpose of defeating and evading the taxes, as denounced by the criminal provisions of the income tax law under which the indictment was laid. The government, of course, offered defendant's income tax return bearing his signature, which was also not denied, and followed this up with evidence to support the charge in the indictment that accused had returned only $5,098.68 as income upon which a tax

of $822.38 had been paid; whereas, his true income had been $101,301.34, on which he owed the sum of $63,458.06 as taxes.

It is believed to be more logical to consider these alleged errors in reverse order, that is, the exclusion of evidence as to what had been paid, and then giving the charge hereafter quoted.

In his opening statement, counsel for the government told the jury:

> "That the defendant was a large citrus fruit grower; had groves in counties, in several counties, Polk County and others around there; and he sold his fruit and received many thousands of dollars for his fruit that he did not account for.
>
> "We will put in the cancelled checks that they paid him. The originals, or photostatic copies. And it will amount when we get through—it is not like one of these net worth cases; it is just a matter of addition and subtraction."

The first witness called by the prosecution was one Jack R. Davis, who testified he was the "Assistant Head of the Accounting Branch in the office of the Director of Internal Revenue * * *" but did not know defendant personally. The witness had produced in response to subpoena *duces tecum* "the original * * * income tax return" of defendant, to which were attached "certain schedules" which were offered and received in evidence as Government's Exhibit No. 1, without objection. Thereupon counsel for the Government stated in the presence of the jury:

> "May it please the Court and Gentlemen of the Jury: This income tax return, the indictment is based

on that, and you will have it to look at later on, and it shows the filing, and with respect to the question asked by defense counsel as to the wife of the defendant, the answers to this question is a question that is asked, 'Is your wife making a separate return for 1946?' and the answer is 'No'. So this is the separate return of Philip Berkovitz, as far as the facts appearing now are concerned."

On cross examination, the witness stated that the return showed on its face that it had been made by a "Certified Public Accountant". This was later verified by the accountant, Frank L. Cowles, who stated that the return had been prepared in his office (as a Public Accountant) in Tampa, Florida, under Cowles' supervision, entirely from data furnished by defendant's bookkeeper. However, in response to questions by Government's counsel, he further stated that he had not examined any books of Berkovitz.[1]

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[1] "By Mr. Phillips: Q. As I understand it, you did not check against the records of Mr. Berkovitz that he kept of his business to see whether or not he had given you all the information he had about his income? A. Not as I recall, Mr. Phillips. Of course, I didn't make this return myself, and I am not sure just what was done. Records may have been furnished to us, but I don't think they were, because the information that was furnished was sufficient, as it was apparently taken from the records. And I doubt if other records were furnished, but that's mostly recollection, because one of my men made the return.

"Q. Was it furnished you in writing? A. Yes, sir.

"Q. And you have that writing with you? A. Yes, sir, it's in the form of trial balances and figures.

"Q. Now, please state to the jury what, according to the income tax return and the other data you have, how much that the income tax you found was due by Phillip Berkovitz for the year 1946, received for citrus fruit for the year 1946, what the total amount he received is? A. $203,398.05." (R. 20-21.)

The prosecution then introduced testimony of Walter G. Howard, the bookkeeper who had kept defendant's books for the period involved, to show where he had gotten the data for entry in the books. Howard was asked by the court:

"Q. Are you a bookkeeper? A. Supposedly, yes, sir.

"The Court: And you kept books for Mr. Berkovitz during the period in question, 1946? A. Part of the time, yes, sir."

The witness was presented by Government's counsel with a document he had produced at their instance and identified it as a "record of checks recorded by Mr. Berkovitz and given to me, which was transferred to the journal sheets on the books."

"By Mr. Hill (counsel for defendant): Q. Mr. Howard, are these figures in your handwriting? A. Yes, sir.

"Q. This isn't on the books you kept for Mr. Berkovitz? A. No.

"Mr. Hill: Are you through with the witness?

"The Court: He has offered the document in evidence, as I understand, and you are permitted to cross examine for the purpose of objection.

"Mr. Hill: I understand.

"By Mr. Hill: Q. And these figures are in your handwriting? A. Yes, sir.

"Q. But these are not the only books you kept? A. No, these were taken from the journal or ledger, as I remember—I don't recall definitely which.

"Q. You don't remember whether it was taken from the journal or the ledger? A. I don't recall definitely, no, sir. Those checks were recorded in the journal sheets and posted in the ledger.

"Mr. Hill: Your Honor, I don't see the relevancy of these figures, these are not his books, that's just something he copied from books.

"The Court: When did you make this list, Mr. Howard? A. I don't remember—is it dated at the top?"

The Court then took over and examined the witness, objection was made to the document by counsel for the defendant and the Court stated, "I am going to mark this paper No. 2 for identification for the Government, and it may be connected up later on."

When the witness was finally taken on cross examination by counsel for the defendant, he testified as indicated in footnote.[2]

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[2] "By Mr. Hill: Q. And full-time after that, is that correct? A. After September—let's see—September 28th. About September 21st, it seems from these checks.

"Q. You kept his books as they related to his fruit business, grove business; isn't that correct? A. To the best information obtainable; yes, sir.

"Q. Yes, sir. Now you did that for the full year 1946—may I have those? A. For the full year 1946?

"Q. Yes. He didn't have any other bookkeeper keeping his books as regards his fruit business in 1946, did he? A. None that I know of.

"Q. Well, you would have known it if he did have, wouldn't you?

"The Court: That calls for a conclusion.

"Mr. Hill: Sir?

"The Court: He has answered the question. He said no other bookkeeper that he knew of." (R. 29-30.)

Further on in his testimony on cross examination, he admitted that the document from which he was testifying was made up after he left defendant's employ. Counsel for defendant then had him identify another paper and when it was attempted to interrogate the witness about it, the court intervened, ruling that, although the witness admitted it was in his handwriting and dealt with the same subject matter, the court said, "This isn't anything in cross. You don't need to answer that."

> "By Mr. Hill: Q. Mr. Howard, when you made up the figures on that piece of paper that I showed you, were they made about December 27th, as noted on that paper?
>
> The Court: This isn't anything in cross. You don't need to answer that. You will have to call this man as your witness to bring out what he did about that statement."

Other witnesses were introduced to prove purchases of fruit from defendant and to show deposits of funds in banks, et cetera, the purpose being to establish the quantity and value of sales as bearing upon defendant's income.

Thereafter a Special Agent of the Bureau of Internal Revenue was called by the Government to testify generally about his investigation, talks with defendant, sources of information, et cetera. He stated that the tax actually due for the calendar year 1946 was, as charged in the indictment, $63,458.06 (R. 247). Counsel for defendant then questioned him about how much taxes the defendant had actually paid and after considerable exchanges between them, the witness insisting he had not actually collected any money, counsel for defendant asked:

"Q. You are thoroughly familiar with the fact, though, aren't you?"

Thereupon the Court intervened:

"The Court: Listen, please don't argue with this witness. Just ask him about factual matters. He hasn't testified Mr. Hollingsworth came to Winter Haven and did anything. You can't assume something that he hasn't already testified to. Now if you want to make a showing, you can make it by a witness that says he knows something about it.

"Mr. Hill: I thought this man knew something about it. I am sorry.

"The Court: Well, you have asked him a great deal that he hasn't testified to, which is unfair to the witness. All right, proceed with the examination."

Thereafter counsel questioned the witness at length on the matter of where he got his information to determine the amount of taxes due.

The immediately foregoing discussion and quotations are for the purpose of disclosing the rather restricted manner in which counsel for defendant was permitted to deal with Government witnesses, as a sort of background for disposing of the ruling complained of in alleged error No. 3 with its possible effects upon the jury.

As his own and last witness, defendant was asked about how much he had paid as income taxes for 1946.

"Q. Philip (Berkovitz), in round figures, how much income tax have you paid for the calendar year 1946?

"Mr. Hulsey: Your Honor, I am objecting to that question on the ground that this is not a suit for income tax, this is a criminal case, and civil income tax liability does not enter into the case here.

"Mr. Hill: Well, Your Honor, it enters into that indictment.

"The Court: I think he can ask him what he paid with the return; what he has paid since that date he cannot; what he has paid since that date it seems to me is immaterial."

Defendant's counsel then attempted to introduce the Revenue Agent's report for 1948 for comparison, in view of the inefficient and incompetent work of Howard as bookkeeper, as defendant contended, with the year 1946. Similar objection was made by counsel for the Government, and defendant's attorney explained the purpose as stated below:

"Mr. Hill: Well, it is a Revenue Agent's Report for the year 1948, and I don't mind, if I may say so, my purpose is to show by comparison his income from these groves in 1948 with the alleged income of 1946.

"The Court: I will mark them for identification, Mr. Hill, but I will exclude it from evidence. 'H' for identification. It seems to me to have no bearing whatever on this, yet.

"Mr. Hill: Well, you understand my purpose in wanting it in evidence, I believe. There is no need to—I don't suppose you would want to hear from me on that subject at all?

"The Court: No, I have already ruled."

However, in the general charge, the Court instructed the jury:

> "There is a distinction between the civil liability of a defendant and his criminal liability. This is a criminal case. The defendant is charged under the law with the commission of a crime, and the fact that he has or has not settled the civil liability for the payment of taxes claimed to be due to the United States is not to be considered by you in determining the issues in this case, *except as it may throw some light on the intent of the defendant.*" (Emphasis by the writer.)

[1] It is contended, of course, that since the Government's witness, Special Examiner Thornton, had testified that defendant actually owed $63,458.06 instead of the $822.38 shown and paid when the return was filed, this instruction in the general charge was highly prejudicial not only because of its bearing upon the matter of good faith of accused initially, but because the sole effect was to tell the jury in so many words that they could consider the failure to pay the tax actually due as throwing "light on the intent of the defendant". We agree with counsel of the defendant that this was reversible error in view of the exclusion of defendant's testimony as well as other evidence to establish he had since paid the tax. Barshop v. United States, 5 Cir., 1951, 192 F.2d 699, certiorari denied 342 U.S. 920, 72 S.Ct. 367, 96 L.Ed. 688; Heindel v. United States, 6 Cir., 1945, 150 F.2d 493; United States v. Matot, 2 Cir., 1944, 146 F.2d 197, 198; United States v. Wicoff, 7 Cir., 1951, 187 F.2d 886, 890-891; White v. Van Horn, 159 U.S. 3, 11, 15 S.Ct. 1027, 40 L.Ed. 55, 58;

Loews, Inc. v. Cole, 9 Cir., 1950, 185 F.2d 641, 661-662; Baer Bros. Land & Cattle Co. v. Palmer, 10 Cir., 1946, 158 F.2d 278, 280; Hill v. Hill, 55 Ga.App. 500, 190 S.E. 411; Jaeger v. Hackert, 241 Iowa, 379, 41 N.W.2d 42.

Alleged Error No. 1.

As stated earlier, there was no denial that a substantial part of appellant's income had not been returned, and his innocence or guilt depended upon what the jury believed about his honesty in signing the return prepared by the Certified Public Accountant Cowles. It is therefore necessary to examine the charge complained of along with the matters dealt with in connection with alleged error No. 3 above, to see whether it was made clear as to where the burden rested to prove bad faith.

Before using the language complained of in Specification of Error No. 1, the Court had stated in its general charge as indicated in footnote.[3] Then followed the language com-

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[3] "The questions that you must determine narrow themselves more or less down to two. First, did he file or cause to be filed, that is the defendant, Mr. Berkovitz, did he file or cause to be filed, a false and fraudulent return for the reason that it understated his income substantially, and hence understated the tax owed substantially. That is the first thing you must determine. The second thing is, if you find that to be so, did he do this wilfully and knowingly and in an attempt to defeat and evade the tax due the United States for the calendar year in question. Those are the matters that are in controversy here, those are the matters that you must take all this evidence and study it, weigh it, and determine from your examination of the evidence.

"Now the word 'wilfully' in the sense used here, denotes often, intentional, knowing, or voluntary, as distinguished from an accidental act, and also employed to characterize the thing done without grounds for believing it lawful or conduct marked by careless disregard of whether one has the right so to act, but, when used

plained of and quoted with respect to this specification of error.

With respect to the first question stated in the beginning of the quoted charge, the Court told the jury elsewhere, "There is no serious dispute but that a return for the calendar year 1946 was filed by Mr. Berkovitz with the Collector and that it is here in evidence as Government Exhibit No. 1". It had, of course, told the jury in other parts of the charge that the defendant was presumed to be innocent until proved guilty beyond a reasonable doubt with full elucidation of what this meant. However, the error was in telling them that as a matter of law they could presume criminal intent from the circumstances described in the questioned charge, without at the same time telling them they must consider all the evidence including that offered by defendant to disprove that intent, that the burden of proof never shifted and the Government, in spite of those circumstances, was required to prove the guilt of defendant beyond a reasonable doubt. This, of course, included defendant's own testimony and all other evidence offered by him to establish good faith and his contention that he had signed the return because of ig-

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in a criminal statute, gentlemen, generally means an act done with bad purpose, without justifiable excuse, stubbornly, obstinately, or perversely.

* * * * * * * *

"The attempt to defeat and evade the tax must be a wilfull attempt, that is to say, it must be made with the intent to keep from the government a tax imposed by the income tax laws which it was the duty of the defendant to pay to the government. The attempt must be wilfull, that is, intentionally done with the intent that the government should be defrauded of the income tax due from the defendant." (R. 593-595.)

norance of the state of his business, depending upon Howard, the bookkeeper, to report his income properly. In this instance the Court was dealing with a single piece of documentary evidence, the return, and the jury could have considered it as conclusive of the intent to defraud.

In Morissette v. United States, 342 U.S. 246, 274-275, 72 S.Ct. 240, 255, 96 L.Ed. 288, the Supreme Court said:

> "*Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury.* State court authorities cited to the effect that intent is relevant in larcenous crimes are equally emphatic and uniform that it is a jury issue. The settled practice and its reason are well stated by Judge Andrews in People v. Flack, 125 N.Y. 324, 334, 26 N.E. 267, 270: 'It is alike the general rule of law, and the dictate of natural justice, that to constitute guilt there must be not only a wrongful act, but a criminal intention. Under our system (unless in exceptional cases), both must be found by the jury to justify a conviction for crime. However clear the proof may be, or however incontrovertible may seem to the judge to be the inference of a criminal intention, *the question of intent can never be ruled as a question of law, but must always be submitted to the jury.* Jurors may be perverse, the ends of justice may be defeated by unrighteous verdicts; but so long as the functions of the judge and jury are distinct, the one responding to the law, the other to the facts, neither can invade the province of the other without destroying the significance of trial by court and jury. * * * '
>
> "*It follows that the trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act.* It often is tempting to cast in terms of a 'presumption' a con-

clusion which a court thinks probable from given facts. The Supreme Court of Florida, for example, in a larceny case, from selected circumstances which are present in this case, has declared a presumption of exactly opposite effect from the one announced by the trial court here: '* * * *But where the taking is open and there is no subsequent attempt to conceal the property, and no denial, but an avowal, of the taking, a strong presumption arises that there was no felonious intent, which must be repelled by clear and convincing evidence before a conviction is authorized.* * * *' Kemp v. State, 146 Fla. 101, 104, 200 So. 368, 369.

"*We think presumptive intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary.* Even congressional power to facilitate *convictions by substituting presumptions for proof is not without limit.* Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519." (Emphasis by the writer.)

[2, 3] In the cited case the trial court had not told the jury that intent was necessary, but specifically charged

that it was not. Yet, the Supreme Court took occasion to say in substance what we have attempted to emphasize here, that is, "intent must be based" upon "all the evidence considered together", and that to say to the jury in the present case that it might find guilt as a matter of law from a presumption flowing from the fraudulent making of the return without at the same time telling it that the evidence offered by the accused to show good faith had to be taken into consideration in reaching such result, "would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime." The quotation from the Florida case above is especially pertinent, in view of the contention of the defendant that there was no attempt to conceal his activities in that the proceeds of the fruit involved as additional income were deposited openly in banks and every effort made to facilitate the Agents of the Internal Revenue Department in ascertaining the facts.

Counsel for the Government further contend that appellant did not properly object to the charge as finally given and complained of here, as required by Rule 30 of the Federal Rules of Criminal Procedure, 18 U.S.C. What took place with respect to the charge is quoted in footnote.[4]

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[4] "The Court: I would like to have some expression from counsel about how much time you want to argue it.

"Mr. Hill: You were asking about the argument. Do you mean argument to the jury?

"The Court: Yes, sir.

"Mr. Hill: I don't know how long we might argue the instructions.

"The Court: I will tell you, I am not going to hear much argument on the instructions. I am required to indicate my ruling in

Appendix C — Berkovitz v. United States

The Government's proposed charge No. 1 embraced the same subject matter with respect to the presumption flowing from the making and signing of the return as heretofore indicated by the change made by the court, consisting of the interlining of the word "conscious" so as to produce the alleged erroneous charge given.

In connection with the discussion of this carge the Court made a general statement.[5]

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advance of the arguments. I will go over them over the week end and I will give you an exception to my ruling out of the presence of the jury. I don't propose to take a lot of time to hear a lot of argument." (R. 565-566.)

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"And thereupon at 9:15 o'clock a.m. Monday, January 26, 1953, Court was reconvened pursuant to adjournment of Court on Friday, January 23, 1953, and the following further proceedings were had:

"The following proceedings were had in chambers, in the absence of the jury:

"The Court: Gentlemen, Counsel has been called to come in here in chambers before the opening of court this morning in order that the Court might comply with the rule and indicate any ruling on requested charges to you before the argument. We want to take up first the Government's requested charges, and then the ones requested by the defendant, Berkovitz. As I understood on Friday you all had exchanged carbons of these, so that you each are familiar with the other's charges without going over them now, is that correct?

"Mr. Arnold: Yes, sir, we exchanged them Friday, Your Honor." (R. 568-569.)

[5] "The Court: Gentlemen, I think that may save us a little time here if, after I indicate a ruling on the charge, that if you have objection that you state it at that time.

"Mr. Arnold: You want to finish the entire charge?

"The Court: Well, I will take it either way, but it may be better after each charge if you have objection to state it at that time.

"Mr. Arnold: Well, Your Honor, as to the whole charge, we do have the objection to the giving of it, Number One, in the eighth

The exact charge now complained of was held to be erroneous by this Court in Wardlaw v. United States, 203 F.2d 884, and it is unnecessary to repeat the reasons there given. However, the fundamental error is that in a criminal case where the defense, as here, was good faith and absence of criminal intent, what was said had the effect of telling the jury as a matter of law that such proof was sufficient without more to show criminal intent, whereas this was one of the most important phases of the issues of fact that the prosecution was bound to prove beyond a reasonable doubt. The distinction is the difference between facts *tending* to establish guilt and telling the jury they may in effect consider guilt proven thereby. The Court undoubtedly may tell them they are entitled to consider the circumstances described in the charge as tending to prove intent

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line of the first paragraph after the words 'And that he attempted to evade or defeat the tax thereon', we think the words 'wilfully' and knowingly attempted to evade or defeat the tax' should be inserted in that.

"The Court: I think it is taken care of, down below, but if there is no objection I don't mind inserting wilfully and knowingly.

"Mr. Arnold: The second paragraph as originally stated, of course, I will object to that, but as amended, I think it just repeats what—

"The Court: I think that may be all right.

"Mr. Arnold: As to the third paragraph, the last line, or the last sentence 'the presumption is that a person intends the natural consequences of his acts, and the natural presumption would be if a person consciously, knowingly, or intentionally did not set up his income and thereby the Government was cheated or defrauded of taxes', I think the word conscious should be in there, 'natural consequence of his conscious acts', etc.

"The Court: I am going to add the word before 'acts,' the word 'conscious'; I don't take it that that conflicts with 'presumption of innocence'. Number two—**I will show your objection to number one of the grounds given.**" (R. 570-571.) (Emphasis by the writer.)

but when it said that such intent was to be presumed from the facts stated, it necessarily shifted the burden thereafter to the shoulders of the accused to prove his innocence.

This error was further added to when the Court told the jury:

> "You are instructed that *you may find from the facts that the defendant signed his individual income tax returns that he had knowledge of the contents of the return.*
>
> "*The owner of a business need not be the actual bookkeeper to be familiar with the affairs and finances of that business, but he must be held to know that which it is his duty to know.* It is for you to determine from all of the evidence whether the defendant has knowledge of the falsity of this return, provided you also find that the return was false." (Emphasis by the writer.)

See authorities cited in Wardlaw v. United States, supra.

As to Specification of Error No. 2, we think that the matters requested in the special charges of defendant, Nos. 8 and 14 were sufficiently covered in the general charge and the judge was not required to submit them to the jury as written in defendant's request.

Portions of No. 16 were also covered in the general charge but other parts thereof were objectionable without language to support the conclusion that defendant's action was in good faith.

Specification of Error No. 4 has to do with a statement by counsel for the Government as to what was intended to be proven, was not involved in any charge of the court,

and therefore furnishes no basis for complaint by the defendant.

As to Specification No. 5, in view of the disposition that we make of this case, it is not deemed necessary to rule upon the tense used as to whether accused "had" or "has" knowledge of the falsity of the return. The court below, on another trial, we take it, will make it clear that defendant should have had knowledge of the falsity when the return was signed and filed.

Specification No. 6, as to abuse of discretion in denying a bill of particulars and refusing to grant a new trial also passes out of the case. Defendant admits the information requested by the motion for particulars was subsequently obtained and the ruling here has the same effect as if the Court below had granted a new trial.

The judgment appealed from is reversed and the cause remanded for further proceedings not inconsistent with the views expressed herein.

APPENDIX "C"

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*JOSEPH EDWARD MORISSETTE, Petitioner,

v.

UNITED STATES OF AMERICA

(342 U.S. 246, 96 L. ed. 288, 72 S. Ct. 240)

SUMMARY OF DECISION

Without any attempt at concealment, defendant, when hunting on a government bombing range, carried away and thereafter sold three tons of used bomb casings dumped there in heaps, some of which had been accumulating for four years or more. Over his defense that he believed the casings to be abandoned, he was convicted for violation of 18 U.S.C. § 641, making it a criminal offense to embezzle, steal, purloin, or knowingly convert government property. The trial court refused to submit, or to allow defendant's counsel to argue, to the jury whether defendant acted without wrongful or criminal intent, and instructed the jury to the effect that lack of a criminal intent was no defense, ruling that such intent was "presumed by his own act."

In an opinion by JACKSON, J., the Supreme Court reversed the conviction on the ground that criminal intent was an essential prerequisite of criminal liability under any of the alternatives stated in § 641, and that the existence of such intent was not to be presumed as a matter of law, but was to be found by the jury upon a consideration of all of the circumstances, rather than upon the isolated act of taking.

DOUGLAS, J., concurred in the result.

MINTON, J., did not participate.

[No. 12]

Argued October 9 and 10, 1951. Decided January 7, 1952.

ON WRIT of Certiorari to the United States Court of Appeals for the Sixth Circuit to review a judgment affirming a conviction in the United States District Court for the Eastern District of Michigan of stealing and knowingly converting property of the United States. Reversed.

See same case below, 187 F.2d 427.

Andrew J. Transue, of Flint, Michigan, argued the cause and filed a brief for petitioner:

A felonious intent is a necessary ingredient of the crime charged. See Adolfson v. United States (C.A.9th Cal.) 159 F.2d 883.

It would appear from the statements made by everyone who worked on the codification and revision from 1943 on and from the committee report and from the presentation of the bill to the House and Senate, that no drastic change of substantive law was made, and certainly none such as claimed by the circuit court of appeals in the decision of this case.

It will not be inferred that the Legislature, in revising and consolidating the laws, intended to change their policy, unless such intention be clearly expressed. United States v. Ryder, 110 U.S. 729, 28 L. ed. 308, 4 S. Ct. 196, citing McDonald v. Hovey, 110 U.S. 619, 28 L. ed. 269, 4 S. Ct.

142. See also Anderson v. Pacific Coast S. S. Co. 225 U.S. 187, 56 L. ed. 1047, 32 S. Ct. 626; Hale v. Iowa State Board of Assessment & Review, 302 U.S. 95, 82 L. ed. 72, 58 S. Ct. 102; United States v. Sischo, 262 U.S. 165, 67 L. ed. 925, 43 S. Ct. 511.

The trial court committed error by directing a verdict of guilty. See United States v. Murdock, 290 U.S. 389, 78 L. ed. 381, 54 S. Ct. 223. Cf. also People v. Lee, 258 Mich. 621, 242 N.W. 787.

Special Assistant to the Attorney General Robert W. Ginnane, of Washington, D. C., argued the cause, and, with Solicitor General Perlman, Assistant Attorney General James M. McInerney, and J. F. Bishop, also of Washington, D. C., filed a brief for respondent:

The court below correctly refused to read into "knowingly converts", as used in 18 U.S.C. § 641, the intent requirements of common-law larceny.

The disjunctive use of the words "embezzles", "steals", "purloins", "or knowingly converts" alone suggests that Congress has, in a single paragraph, defined separate and and distinct crimes involving different elements. See Horowitz v. United States (C.A.2d N.Y.) 262 F. 48, cert. den. 252 U.S. 588, 64 L. ed. 729, 40 S. Ct. 396; Adolfson v. United States (C.A.9th Cal.) 159 F.2d 883, cert. den. 331 U.S. 818, 91 L. ed. 1836, 67 S. Ct. 1307.

In the absence of evidence to the contrary, it is to be presumed that the words and phrases selected for consolidation were taken with their meaning as established by judicial decisions. See Crabb v. Zerbst (C.A.5th Ga.) 99 F.2d 562; United States v. Handler (C.A.2d N.Y.) 142

F.2d 351, cert. den. 323 U.S. 741, 89 L. ed. 594, 65 S. Ct. 40; United States v. De Normand (C.A.2d N.Y.) 149 F.2d 622, cert. den. 326 U.S. 756, 90 L. ed. 454, 66 S. Ct. 89, reh. den. 326 U.S. 808, 811, 90 L. ed. 493, 495, 66 S. Ct. 165, 331, 327 U.S. 816, 90 L. ed. 1069, 66 S. Ct. 676, cert. den. 330 U.S. 822, 91 L. ed. 1272, 67 S. Ct. 769, reh. den. 330 U.S. 854, 91 L. ed. 1296, 67 S. Ct. 860.

The present § 641 was drafted with full knowledge as to what language would be construed to cover only common-law larceny, with the knowledge that the words "steal" and "purloin" had been construed as having a broader coverage than larceny, and with the knowledge that the disjunctive use of "knowingly converts to his use" would be interpreted literally as defining a crime in addition to stealing and embezzlement.

Moreover, the words "knowingly converts" on their face indicate a legislative purpose to proscribe as a crime what would otherwise constitute merely the tort of conversion.

Such a literal construction of § 641, which ascribes to the disjunctive words "knowingly converts to his use" the definition of a crime in addition to common-law larceny and embezzlement, is consistent with the modern statutory development in this class of offenses.

The trial judge did not invade the province of the jury. See Horning v. District of Columbia, 254 U.S. 135, 65 L.Ed. 185, 41 S.Ct. 53.

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*Mr. Justice *Jackson* delivered the opinion of the Court.

This would have remained a profoundly insignificant case to all except its immediate parties had it not been so tried

and submitted to the jury as to raise questions both fundamental and far-reaching in federal criminal law, for which reason we granted certiorari.[1]

On a large tract of uninhabited and untilled land, in a wooded and sparsely populated area of Michigan, the Government established a practice bombing range over which the Air Forces dropped simulated bombs at ground targets. These bombs consisted of a metal cylinder about forty inches long and eight inches across, filled with sand and enough black powder to cause a smoke puff by which the strike could be located. At various places about the range signs read "Danger—Keep Out—Bombing Range." Nevertheless, the range was known as good deer country and was extensively hunted.

Spent bomb casings were cleared from the targets and thrown into piles "so that they will be out of the way." They were not stacked or piled in any order but were dumped in heaps, some of which had been accumulating for four years or upwards, were exposed to the weather and rusting away.

Morissette, in December of 1948, went hunting in this area but did not get a deer. He thought to meet expenses of the trip by salvaging some of these casings. He loaded three tons of them on his truck and took them to a nearby farm, where they were flattened by driving a tractor over them. After expending this labor and trucking them to market in Flint, he realized $84.

Morissette, by occupation, is a fruit stand operator in summer and a trucker and scrap iron collector in winter.

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[1] 341 U.S. 925, 95 L.Ed. 1356, 71 S.Ct. 796.

An honorably discharged

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veteran of World War II, *he enjoys a good name among his neighbors and has had no blemish on his record more disreputable than a conviction for reckless driving.

The loading, crushing and transporting of these casings were all in broad daylight, in full view of passersby, without the slightest effort at concealment. When an investigation was started, Morissette voluntarily, promptly and candidly told the whole story to the authorities, saying that he had no intention of stealing but thought the property was abandoned, unwanted and considered of no value to the Government. He was indicted, however, on the charge that he "did unlawfully, willfully and knowingly steal and convert" property of the United States of the value of $84, in violation of 18 USC § 641, which provides that "whoever embezzles, steals, purloins, or knowingly converts" government property is punishable by fine and imprisonment.[2] Morissette was convicted and sentenced to imprisonment for two months or to pay a fine of $200. The Court of Appeals affirmed, one judge dissenting.[3]

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[2] 18 U.S.C. § 641, so far as pertinent, reads:

"Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof;

* * * * * *

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

[3] Morissette v. United States, 187 F.2d 427.

Appendix C — Morissette v. United States

On his trial, Morissette, as he had at all times told investigating officers, testified that from appearances he believed the casings were cast-off and abandoned, that he did not intend to steal the property, and

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took it with no *wrongful or criminal intent. The trial court, however, was unimpressed, and ruled: "He took it because he thought it was abandoned and he knew he was on government property. . . . That is no defense. . . . I don't think anybody can have the defense they thought the property was abandoned on another man's piece of property." The court stated: "I will not permit you to show this man thought it was abandoned. . . . I hold in this case that there is no question of abandoned property." The court refused to submit or to allow counsel to argue to the jury whether Morissette acted with innocent intention. It charged: "And I instruct you that if you believe the testimony of the government in this case, he intended to take it. . . . He had no right to take this property. . . . [A]nd it is no defense to claim that it was abandoned, because it was on private property. . . . And I instruct you to this effect: That if this young man took this property (and he says he did), without any permission (he says he did), that was on the property of the United States Government (he says it was), that it was of the value of one cent or more (and evidently it was), that he is guilty of the offense charged here. If you believe the government, he is guilty. . . . The question on intent is whether or not he intended to take the property. He says he did. Therefore, if you believe either side, he is guilty." Petitioner's counsel contended, "But the taking must have been with

a felonious intent." The court ruled, however: "That is presumed by his own act."

The Court of Appeals suggested that "greater restraint in expression should have been exercised," but affirmed the conviction because, "As we have interpreted the statute, appellant was guilty of its violation beyond a shadow of doubt, as evidenced even by his own admissions." Its construction of the statute is that it creates several separate and distinct offenses, one

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being knowing *conversion of government property. The court ruled that this particular offense requires no element of criminal intent. This conclusion was thought to be required by the failure of Congress to express such a requisite and this Court's decisions in United States v. Behrman, 258 U.S. 280, 66 L.Ed. 619, 42 S.Ct. 303, and United States v. Balint, 258 U.S. 250, 66 L.Ed. 604, 42 S.Ct. 301.

I.

In those cases this Court did construe mere omission from a criminal enactment of any mention of criminal intent as dispensing with it. If they be deemed precedents for principles of construction generally applicable to federal penal statutes, they authorize this conviction. Indeed, such adoption of the literal reasoning announced in those cases would do this and more—it would sweep out of all federal crimes, except when expressly preserved, the ancient requirement of a culpable state of mind. We think a resume of their historical background is convincing that an effect has been ascribed to them more comprehensive than was

contemplated and one inconsistent with our philosophy of criminal law.

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.[4] A relation between some mental element and punishment for

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a *harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to", and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.[5] Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by

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[4] For a brief history and philosophy of this concept in Biblical, Greek, Roman, Continental and Anglo-American law see Radin, Intent, Criminal, 8 Enc Soc Sci 126. For more extensive treatment of the development in English law, 2 Pollock & Maitland, History of English Law, 448-511. "Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong." Pound, Introduction to Sayre, Cases on Criminal Law (1927).

[5] In Williams v. New York, 337 U.S. 241, 248, 93 L.Ed. 1337, 1343, 69 S.Ct. 1079, we observed that "Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence." We also there referred to ". . . a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime." Id., 337 U.S. at 247, 93 L.Ed. 1342, 69 S.Ct. 1079. Such ends would seem illusory if there were no mental element in crime.

Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will."[6] Common-law commentators of the Nineteenth Century early pronounced the same principle,[7] although a few exceptions not relevant to our present problem came to be recognized.[8]

Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism

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*and took deep and early root in American soil.[9] As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle

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[6] 4 Blackstone's Commentaries 21.

[7] Examples of these texts and their alterations in successive editions in consequence of evolution in the law of "public welfare offenses," as hereinafter recited, are traced in Sayre, Public Welfare Offenses, 33 Col L Rev 55, 66.

[8] Exceptions came to include sex offenses, such as rape, in which the victim's actual age was determinative despite defendant's reasonable belief that the girl had reached age of consent. Absence of intent also involves such considerations as lack of understanding because of insanity, subnormal mentality, or infancy, lack of volition due to some actual compulsion, or that inferred from doctrines of coverture. Most extensive inroads upon the requirement of intention, however, are offenses of negligence, such as involuntary manslaughter or criminal negligence and the whole range of crimes arising from omission of duty. Cf. Commonwealth v. Welansky, 316 Mass. 383, 55 N.E.2d 902 (1944).

[9] Holmes, The Common Law, considers intent in the chapter on The Criminal Law, and earlier makes the pithy observation: "Even a dog distinguishes between being stumbled over and being kicked." P. 3. Radin, Intent, Criminal, 8 Enc Soc Sci 126, 127, points out that in American law "mens rea was not so readily constituted from any wrongful act" as elsewhere.

but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation. Courts, with little hesitation or division, found an implication of the requirement as to offenses that were taken over from the common law.[10] The unanimity with which they have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element. However, courts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as "felonious intent", "criminal intent", "malice aforethought", "guilty knowledge", "fraudulent intent", "wilfulness", "scienter", to denote guilty knowledge, or "mens rea", to signify an evil purpose or mental culpability. By use or combination of these various tokens, they have sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes.

However, the Balint and Behrman offenses belong to a category of another character, with very different antecedents and origins. The crimes there involved depend

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*on no mental element but consist only of forbidden acts or omissions. This, while not expressed by the Court, is made clear from examination of a century-old but ac-

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[10] In the Balint Case, 258 U.S. 250, 66 L.Ed. 604, 42 S.Ct. 301, Chief Justice Taft recognized this but rather overstated it by making no allowance for exceptions such as those mentioned in 8.

celerating tendency, discernible both here[11] and in England,[12]

[11] This trend and its causes, advantages and dangers have been considered by Sayre, Public Welfare Offenses, 33 Col L Rev 55; Hall, Prolegomena to a Science of Criminal Law, 89 U. of Pa. L. Rev. 549; Hall, Interrelations of Criminal Law and Torts, 43 Col. L. Rev. 753, 967.

[12] The changes in English law are illustrated by Nineteenth Century English cases. In 1814, it was held that one could not be convicted of selling impure foods unless he was aware of the impurities. Rex. v. Dixon, 3 Maule & S. 11, 105 Eng. Reprint 516 (KB, 1814). However, thirty-two years later, in an action to enforce a statutory forfeiture for possession of adulterated tobacco, the respondent was held liable even though he had no knowledge of, or cause to suspect, the adulteration. Countering respondent's arguments, Baron Parke said, "It is very true that in particular instances it may produce mischief, because an innocent man may suffer from his want of care in not examining the tobacco he has received, and not taking a warranty; but the public inconvenience would be much greater, if in every case the officers were obliged to prove knowledge. They would very seldom be able to do so." Reg. v. Woodrow, 15 Mees & W 404, 417, 153 Eng. Reprint 907 (Exch, 1846). Convenience of the prosecution thus emerged as a rationale. In 1866, a quarry owner was held liable for the nuisance caused by his workmen dumping refuse into a river, in spite of his plea that he played no active part in the management of the business and knew nothing about the dumping involved. His knowledge or lack of it was deemed irrelevant. Reg. v. Stephens (Eng.) LR 1 QB 702 (1866). Bishop, referring to this decision, says, "The doctrine of this English case may almost be deemed new in the criminal law. . . . And, properly limited, the doctrine is eminently worthy to be followed hereafter." 1 Bishop, New Criminal Law (8th ed. 1892) § 1076. After these decisions, statutes prohibiting the sale of impure or adulterated food were enacted. Adulteration of Food Act (35 & 36 Vict. ch. 74, § 2, (1872)); Sale of Food and Drugs Act of 1875 (38 & 39 Vict. ch. 63). A conviction under the former was sustained in a holding that no guilty nowledge or intent need be proved in a prosecution for the sale of adulterated butter, Fitzpatrick v. Kelly (Eng.) LR 8 QB 337 (1873), and in Betts v. Armstead (Eng.) LR 20 QB Div. 771 (1888), involving the latter statute, it was held that there was no need for a showing that the accused had knowledge that his product did not measure up to the statutory specifications.

to call into existence new duties and crimes which disregard any ingredient of intent. The industrial revolution

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*multiplied the number of workmen exposed to injury from increasingly powerful and complex mechanisms, driven by freshly discovered sources of energy, requiring higher precautions by employers. Traffic of velocities, volumes and varieties unheard of, came to subject the wayfarer to intolerable casualty risks if owners and drivers were not to observe new cares and uniformities of conduct. Congestion of cities and crowding of quarters called for health and welfare regulations undreamed of in simpler times. Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure and care. Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare.

While many of these duties are sanctioned by a more strict civil liability,[13] lawmakers, whether wisely or not,[14]

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[13] The development of strict criminal liability regardless of intent has been roughly paralleled by an evolution of a strict civil liability for consequences regardless of fault in certain relationships, as shown by Workmen's Compensation Acts, and by vicarious liability for fault of others as evidenced by various Motor Vehicle Acts.

[14] Consequences of a general abolition of intent as an ingredient of serious crimes have aroused the concern of responsible and disinterested students of penology. Of course, they would not justify judicial disregard of a clear command to that effect from Congress, but they do admonish us to caution in assuming that

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*have sought to make such regulations more effective by invoking criminal sanctions to be applied by the familiar technique of criminal prosecutions and convictions. This has confronted the courts with a multitude of prosecutions, based on statutes or administrative regulations, for what have been aptly called "public welfare offenses". These cases do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state,

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Congress, without clear expression, intends in any instance to do so.

Radin, Intent, Criminal, 8 Enc Soc Sci 126, 130, says, ". . . As long as in popular belief intention and freedom of the will are taken as axiomatic, no penal system that negates the mental element can find general acceptance. It is vital to retain public support of methods of dealing with crime." Again, "The question of criminal intent will probably always have something of an academic taint. Nevertheless, the fact remains that determination of the boundary between intent and negligence spells freedom or condemnation for thousands of individuals. The watchfulness of the jurist justifies itself at present in its insistence upon the examination of the mind of each individual offender."

Sayre, Public Welfare Offenses, 33 Col L Rev 55, 56, says: "To inflict substantial punishment upon one who is morally entirely innocent, who caused injury through reasonable mistake or pure accident, would so outrage the feelings of the community as to nullify its own enforcement."

Hall, Prolegomena to a Science of Criminal Law, 89 U. of Pa. L. Rev. 549, 569, appears somewhat less disturbed by the trend, if properly limited, but, as to so-called public welfare crimes, suggests that "There is no reason to continue to believe that the present mode of dealing with these offenses is the best solution obtainable, or that we must be content with this sacrifice of established principles. **The raising of a presumption of knowledge might be an improvement.**" (Emphasis added.)

In Felton v. United States, 96 U.S. 699, 703, 24 L.Ed. 875, 876, the Court said, "But the law at the same time is not so unreasonable as to attach culpability, and consequently to impose punishment, where there is no intention to evade its provisions. . . ."

the person, property, or public morals. Many of these offenses are not in the nature of positive agressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care,

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or inaction where it imposes a duty. Many *violations of such regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize. While such offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted. In this respect, whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. Also, penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation. Under such considerations, courts have turned to construing statutes and regulations which make no mention of intent as dispensing with it and holding that the guilty act alone makes out the crime. This has not, however, been without expressions of misgiving.

Headnote 1

The pilot of the movement in this country appears to be a holding that a tavernkeeper could be convicted for

selling liquor to an habitual drunkard even if he did not know the buyer to be such. Barnes v. State, 19 Conn. 398 (1849). Later came Massachusetts holdings that convictions for selling adulterated milk in violation of statutes forbidding such sales require no allegation or proof that defendant knew of the adulteration. Commonwealth v. Farren (Mass.) 9 Allen 489 (1864); Commonwealth v. Nichols (Mass.) 10 Allen 199 (1865); Commonwealth v. Waite (Mass.) 11 Allen 264, 87 Am Dec 711 (1865).

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Departures from the common-law tradition, *mainly of these general classes, were reviewed and their rationale appraised by Chief Justice Cooley, as follows:

"I agree that as a rule there can be no crime without a criminal intent; but this is not by any means a universal rule. . . . Many statutes which are in the nature of police regulation, as this is, impose criminal penalties irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible." People v. Roby, 52 Mich. 577, 579, 18 NW 365, 366, 50 Am Rep. 270 (1884).

After the turn of the Century, a new use for crimes without intent appeared when New York enacted numerous and novel regulations of tenement houses, sanctioned by money penalties. Landlords contended that a guilty intent was essential to establish a violation. Judge Cardozo wrote the answer:

"The defendant askes us to test the meaning of this statute by standards applicable to statutes that govern in-

famous crimes. The analogy, however, is deceptive. The element of conscious wrongdoing, the guilty mind accompanying the guilty act, is associated with a concept of crimes that are punished as infamous. . . . Even there, it is not an invariable element. . . . But in the prosecution of minor offenses there is a wider range of practice and of power. Prosecutions for petty penalties have always constituted in our law a class by themselves. . . . That is true, though the prosecution is criminal in form." Tenement House Dept. v. McDevitt, 215 NY 160, 168, 109 NE 88, 90, Ann Cas 1917A 455 (1915).

Soon, employers advanced the same contention as to violations of regulations prescribed by a new Labor law. Judge

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Cardozo, again for the court, pointed out, as a basis *for penalizing violations whether intentional or not, that they were punishable only by fine "moderate in amount," but cautiously added that in sustaining the power so to fine unintended violations "we are not to be understood as sustaining to a like length the power to imprison. We leave that question open." People ex rel. Price v. Sheffield Farms-Slawson-Decker Co. 225 NY 25, 32, 33, 121 NE 474, 477 (1918).

Thus, for diverse but reconcilable reasons, state courts converged on the same result, discontinuing inquiry into intent in a limited class of offenses against such statutory regulations.

Before long, similar questions growing out of federal legislation reached this Court. Its judgments were in harmony with this consensus of state judicial opinion, the

existence of which may have led the Court to overlook the need for full exposition of their rationale in the context of federal law. In overruling a contention that there can be no conviction on an indictment which makes no charge of criminal intent but alleges only making of a sale of a narcotic forbidden by law, Chief Justice Taft, wrote:

"While the general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it . . ., there has been a modification of this view in respect to prosecution under statutes the purpose of which would be obstructed by such a requirement. It is a question of legislative intent to be construed by the court. . . ." United States v. Balint, supra (258 US 251, 252, 66 L.Ed. 605, 42 S.Ct. 301).

He referred, however, to "regulatory measures in the exercise of what —is called the police power, where the

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emphasis *of the statute is evidently upon achievement of some social betterment rather than the punishment of crimes, as in cases of mala in se," and drew his citation of supporting authority chiefly from state court cases dealing with regulatory offenses. Id, 258 US at 252, 66 L ed 605, 42 S Ct 301.

On the same day, the Court determined that an offense under the Narcotic Drug Act does not require intent, saying, "If the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not

charge such knowledge or intent." United States v. Behrman, supra (258 US at 288, 66 L ed 621, 42 S Ct 303).

Of course, the purpose of every statute would be "obstructed" by requiring a finding of intent, if we assume that it had a purpose to convict without it. Therefore, the obstruction rational does not help us to learn the purpose of the omission by Congress. And since no federal crime can exist except by force of statute, the reasoning of the Behrman opinion, if read literally, would work far-reaching changes in the composition of all federal crimes. Had such a result been contemplated, it could hardly have escaped mention by a Court which numbered among its members one especially interested and informed concerning the importance of intent in common-law crimes.[15] This might be the more expected since the Behrman holding did call forth his dissent, in which Mr. Justice McReynolds and Mr. Justice Brandeis joined, omitting any such mention.

Headnote 2

It was not until recently that the Court took occasion more explicitly to relate abandonment of the ingredient of intent, not merely with considerations of expediency in obtaining convictions, nor with the malum prohibitum classification of the crime, but with the peculiar nature and quality of the offense. We referred to ". . . a now

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familiar type of legislation whereby penalties serve as *effective means of regulation," and continued, "such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the

[15] Holmes, The Common Law.

interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." But we warned: "Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting." United States v. Dotterweich, 320 US 277, 280, 281, 284, 88 L ed 48, 51, 53, 64 S Ct 134.[16]

Neither this Court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not. We attempt no closed definition, for the law on the subject is neither settled nor static. The conclusion reached in the Balint and Behrman Cases has our approval and adherence for the circumstances to which it was there applied. A quite different question here is whether we will expand the doctrine of crimes without intent to include those charged here.

Headnote 3

Stealing, larceny, and its variants and equivalents, were among the earliest offenses known to the law that existed before legislation;[17] they are invasions of rights of property which stir a sense of insecurity in the whole community and arouse public demand for retribution, the penalty is high and, when a sufficient amount is involved, the in-

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[16] For the place of the mental element in offenses against the revenues, see Spies v. United States, 317 U.S. 492, 87 L.Ed. 418, 63 S.Ct. 364; United States v. Scharton, 285 U.S. 518, 76 L.Ed. 917, 52 S.Ct. 416.

[17] 2 Russell on Crime (10th ed., Turner, 1950) 1037.

famy is that of a felony, which, says Maitland, is ". . . as bad a word as you can give to man or thing."[18] State courts of last resort, on whom fall the heaviest burden

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*of interpreting criminal law in this country, have consistently retained the requirement of intent in larceny-type offenses.[19] If any state has deviated, the exception has

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[18] 2 Pollock & Maitland, History of English Law, 465.

[19] Examples of decision in diverse jurisdictions may be culled from any digest. Most nearly in point are Johnson v. State, 36 Tex. 375, holding that to take a horse running at large on the range is not larceny in the absence of an intent to deprive an owner of his property; Jordan v. State, 107 Tex. Crim. 414, 296 S.W. 585, that, if at the time of taking parts from an automobile the accused believed that the car had been abandoned by its owner, he should be acquitted; Fetkenhauer v. State, 112 Wis. 491, 88 N.W. 294, that an honest, although mistaken, belief by defendant that he had permission to take property should be considered by the jury; and Devine v. People (NY) 20 Hun 98, holding that a claim that an act was only a practical joke must be weighed against an admitted taking of property.

Others of like purport are Farzley v. State, 231 Ala. 60, 163 So. 394; Nickerson v. State, 22 Ala. App. 640, 119 So. 243; People v. Williams, 73 Cal. App 2d 154, 166 P2d 63; Schiff v. People, 111 Colo. 333, 141 P2d 892; Kemp v. State, 146 Fla. 101, 200 So. 368; Perdew v. Commonwealth, 260 Ky. 638, 86 S.W.2d 534, holding that appropriation by a finder of lost property cannot constitute larceny in the absence of intent; People v. Shaunding, 268 Mich. 218, 255 N.W. 770; People v. Will, 289 N.Y. 413, 46 N.E.2d 498; Van Vechten v. American Eagle Fire Ins. Co. 239 N.Y. 303, 146 N.E. 432, 38 ALR 1115; Thomas v. Kessler, 334 Pa. 7, 5 A2d 187; Barnes v. State, 145 Tex. Crim. 131, 166 S.W.2d 708; Sandel v. State, 131 Tex. Crim. 132, 97 S.W.2d 225; Weeks v. State, 114 Tex. Crim. 406, 25 S.W.2d 855; Heskew v. State, 18 Tex. App. 275; Page v. Commonwealth, 148 Va. 733, 138 S.E. 510, holding reversible error to exclude evidence having a tendency to throw light on the question of the bona fides of one accused of larceny; Butts v. Commonwealth, 145 Va. 800, 133 S.E. 764; State v. Levy, 113 Vt. 459, 35 A2d 853, holding that the taking of another's property in good faith by inadvertence or mistake does not constitute larceny.

neither been called to our attention nor disclosed by our research.

Congress, therefore, omitted any express prescription of criminal intent from the enactment before us in the light of an unbroken course of judicial decision in all *constitu-

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ent states of the Union holding intent inherent in this class of offense, even when not expressed in a statute. Con-

Headnote 4

gressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime already so well defined in common law and statutory interpretation by the states may warrant quite contrary inferences than the same silence in creating an offense new to general law, for whose definition the courts have no guidance except the Act. Because the offenses before this Court in the Balint and Behrman Cases were of this latter class, we cannot accept them as authority for eliminating intent from offenses incorporated from the common law. Nor do exhaustive studies of state court cases disclose any well-considered decisions applying the doctrine of crime without intent to such enacted common-law offenses,[20] although a few devia-

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[20] Sayre, Public Welfare Offenses, 33 Col. L. Rev. 55, 73, 84, cites and classifies a large number of cases and concludes that they fall roughly into subdivisions of (1) illegal sales of intoxicating liquor, (2) sales of impure or adulterated food or drugs, (3) sales of misbranded articles, (4) violations of antinarcotic Acts, (5) criminal nuisances, (6) violations of traffic regulations, (7) violations of motor-vehicle laws, and (8) violations of general police regulations, passed for the safety, health or well-being of the community.

tions are notable as illustrative of the danger inherent in the Government's contentions here.[21]

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*The Government asks us by a feat of construction radically to change the weights and balances in the scales of justice. The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. Such a manifest impairment of the immunities of the individual should not be extended to common-law crimes on judicial initiative.

Headnote 5

The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly[22] admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute. And where

Headnote 6

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[21] Sayre points out that in criminal syndicalism or sedition cases, where the pressure to convict is strong, it has been accomplished by dispensing with the element of intent, in some instances by analogy with the public welfare offense. Examples are State v. Hennessy, 114 Wash 351, 195 P 211; People v. Ruthenberg, 229 Mich. 315, 201 N.W. 358; State v. Kahn, 56 Mont. 108, 182 P. 107; State v. Smith, 57 Mont. 563, 190 P. 107. Compare People v. McClennegen, 195 Cal. 445, 234 P. 91. This although intent is of the very essence of offenses based on disloyalty. Cf. Cramer v. United States, 325 U.S. 1, 89 L.Ed. 1441, 65 S.Ct. 918; Haupt v. United States, 330 U.S. 631, 91 L.Ed. 1145, 67 S.Ct. 874, where innocence of intention will defeat a charge even of treason.

[22] United States v. Hudson & Goodwin (US) 7 Cranch 32, 3 L.Ed. 259; United States v. Gooding (US) 12 Wheat 460, 6 L.Ed. 693.

Headnote 7

Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Headnote 8

We hold that mere omission from § 641 of any mention of intent will not be construed as eliminating that element from the crimes denounced.

II.

It is suggested, however, that the history and purposes of § 641 imply something more affirmative as to elimination of intent from at least one of the offenses charged

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under it in this case. The argument does not contest *that criminal intent is retained in the offenses of embezzlement, stealing and purloining, as incorporated into this section. But it is urged that Congress joined with those, as a new, separate and distinct offense, knowingly to convert government property, under circumstances which imply that it is an offense in which the mental element of intent is not necessary.

Congress has been alert to what often is a decisive function of some mental element in crime. It has seen fit to prescribe that an evil state of mind, described variously in one or more such terms as "intentional," "wilful,"

"knowing," "fraudulent" or "malicious," will make criminal an otherwise indifferent act,[23] or increase the degree

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of the offense or its punishment.[24] Also, it has *at times required a specific intent or purpose which will require some specialized knowledge or design for some evil beyond the common-law intent to do injury.[25] The law under some circumstances recognizes good faith or blameless intent as a defense, partial defense, or as an element to be considered

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[23] 18 USC §81, **Arson:** ". . . willfully and maliciously. . . "; 18 USC §113, **Assault:** "(a) . . . with intent to commit murder or rape : . . . (b) . . . with intent to commit any felony, except murder or rape . . . ."; 18 USC § 152, **Bankruptcy—concealment of assets, false oaths and claims, bribery:** ". . . knowingly and fraudulently . . . ."; 18 USC § 201, **Bribery and Graft:** ". . . with intent to influence. . . ."; 18 USC § 471, **Counterfeiting and Forgery:** ". . . with intent to defraud. . . ."; 18 USC § 594, **Intimidation of voters:** ". . . for the purpose of . . . ."; 18 USC § 1072, **Concealing escaped prisoner:** ". . . willfully. . . ."; 61 Stat 151, 29 USC § 162, **Interference with a member of the National Labor Relations Board or an agent of the Board in his performance of his duties:** ". . . willfully . . . ."; 52 Stat 1069, 29 USC § 216(a), **Violations of provisions of Fair Labor Standards Act:** ". . . willfully . . . ."; 37 Stat 251, 21 USC § 23, **Packing or selling misbranded barrels of apples:** ". . . knowingly . . . ."

[24] 18 USC § 1112, Manslaughter, ". . . the unlawful killing of a human being without malice," if voluntary, carries a maximum penalty of imprisonment not to exceed ten years. If the killing is "with malice aforethought," the crime is murder, 18 USC § 1111, and, if of the first degree, punishable by death or life imprisonment, or, if of the second degree, punishable by imprisonment for any term of years or life.

[25] 18 USC § 242; Screws v. United States, 325 U.S. 91, 89 L.Ed. 1495, 65 S.Ct. 1031, 162 ALR 1330.

[26] I.R.C., §§ 145(a), 145(b), 53 Stat 62, as amended, 26 USC §§ 145(a), 145(b), as construed in Spies v. United States, 317 U.S. 492, 87 L.Ed. 418, 63 S.Ct. 364; 52 Stat 1069, 29 USC § 216(a), stating the criminal sanctions for violations of the Fair Labor Standards

in mitigation of punishment.[26] And treason—the one crime deemed grave enough for definition in our Constitution itself—requires not only the duly witnessed overt act of aid and comfort to the enemy but also the mental element of disloyalty or adherence to the enemy.[27] In view of the care that has been bestowed upon the subject, it is significant that we have not found, nor has our attention been directed to, any instance in which Congress has expressly eliminated the mental element from a crime taken over from the common law.

The section with which we are here concerned was enacted in 1948, as a consolidation of four former sections of Title 18, as adopted in 1940, which in turn were derived from two sections of the Revised Statutes. The pertinent

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legislative and judicial history of these antecedents, *as well as of § 641, is footnoted.[28] We find no other purpose

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Act, provides that: "No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection." N.Y. Penal Law, § 1306 provides that, "Upon an indictment for larceny it is a sufficient defense that the property was appropriated openly and avowedly, under a claim of title preferred in good faith, even though such claim is untenable."

[27] U.S. Const. Art. 3, § 3, cl. 1.

This provision was to prevent incrimination of mere mental operations such as "compassing" the death of the King. See Cramer v. United States, 325 U.S. 1, 89 L.Ed. 1441, 65 S.Ct. 918. To hold that a mental element is necessary to a crime is, of course, not to say that it is all that is necessary.

[28] The Reviser's Note to 18 USC § 641 states that it is derived from 18 USC (1940 ed) §§ 82, 87, 100, and 101 which, in turn, are from Rev Stat §§ 5438 and 5439. We shall consider only the 1940 code sections and their interpretations.

18 USC (1940 ed) § 82 reads:

Headnote 9

in the 1948 re-enactment than to collect from scattered sources crimes so kindred as to belong in *one category. Not one of these had been

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"Whoever shall take and carry away or take for his use, or for the use of another, with intent to steal or purloin . . . any property of the United States . . . shall be punished as follows . . ."

In United States v. Anderson (D.C.Cal.) 45 F. Supp. 943, a prosecution for conspiracy to violate that section, District Judge Yankwich said:

"It has been before the courts in very few cases. But such courts as have had cases under it, including our own Ninth Circuit Court of Appeals, have held that the object of the section is to introduce the crime of larceny into the Federal Criminal Code.

"In Franch v. Mass., 9 Cir., 1939, 106 F.2d 820, 821, we find these words: 'larceny of property of the United States is made a crime by 18 U.S.C. § 82.'

"This means of course, that in interpreting the statute, we may apply the principles governing the common law crime of larceny, as interpreted by the courts of various states." 45 F. Supp. at 945.

United States v. Trinder (D.C. Mont.) 1 F. Supp. 659, was a prosecution of a group of boys, under § 82, for "stealing" a government automobile. They had taken it for a joyride without permission, fully intending to return it when they were through. Their plans went awry when the auto came to grief against a telephone pole. In dismissing the complaint, the District Judge said:

"Upon principle and authority there was no stealing but merely trespass; secret borrowing. At common law and likewise by the federal statute (18 U.S.C. § 82) adopting common law terms, stealing in general imports larceny; that is, felonious taking and intent to permanently deprive the owner of his property." 1 F. Supp. at 660.

18 USC (1940 ed) § 87, entitled "Embezzling arms and stores," provides:

"Whoever shall steal, embezzle, or knowingly apply to his own use, or unlawfully sell, convey, or dispose of, any ordnance, arms, ammunition, clothing, subsistence, stores, money, or other property of the United States, furnished or to be used for the military or naval service, shall be punished as prescribed in sections 80 and 82 to 86 of this title."

No cases appear to have been decided relating to the element of intent in the acts proscribed in that section.

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interpreted to be a crime without intention and no purpose to differentiate between them in the matter of intent

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18 USC (1940 ed.) § 100, "Embezzling public moneys or other property," states that:

"Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be fined not more than $5,000, or imprisoned not more than five years, or both."

The only noted case of consequence is Crabb v. Zerbst, 99 F.2d 562 (C.A.5th Cir. Ga.), to which the dissent below referred at some length. The appellant there was convicted of feloniously taking and carrying away certain personal property of the United States in violation of § 46 of the Criminal Code, 18 USC (1940 ed.) § 99, and had been sentenced to seven years' imprisonment. He argued that the five-year limitation of sentence in 18 USC (1940 ed) § 100 for stealing property of the United States reduced the ten-year limitation in § 99 for feloniously taking and carrying away property of the United States to five years also.

The Court of Appeals rejected his argument, holding that the crime of "stealing" in § 100 was separate and distinct from the offense specified in § 99, on the ground that § 100 was a broadening of the common-law crime of larceny to foreclose any avenue by which one might, in the process of pleading, escape conviction for one offense by proving that he had committed another only a hair's breadth different.

In the course of its opinion, it advanced the following pertinent observations:

"That felonious taking and carrying away of property which may be the subject of the offense constitutes the common law offense of larceny cannot be disputed. . . . However, it is doubtful if at common law any fixed definition or formula [as to the meaning of 'larceny'] was not strained in its application to some of the cases clearly constituting the offense. Modern criminal codes treat the offense in various ways. Some define the offense by following the old cases and are merely declaratory of the common law, while others have broadened the offense to include offenses previously known as embezzlement, false pretenses, and even felonious breaches of trust.

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is disclosed. *No inference that some were and some were not crimes of intention can be drawn from any difference

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"As pointed out above, the modern tendency is to broaden the offense of larceny, by whatever name it may be called, to include such related offenses as would tend to complicate prosecutions under strict pleading and practice. In some of these statutes the offense is denominated 'theft' or 'stealing.' No statute offers a clearer example of compromise between the common law and the modern code than the two sections here involved. Section 46 [18 USC § 99 (1940 ed)] deals with robbery and larceny, the description of the latter being taken from the common law. Section 47 [18 USC § 100 (1940 ed)] denounces the related offenses which might be included with those described in section 46 under a code practice seeking to avoid the pitfalls of technical pleading. In it the offense of embezzlement is included by name, without definition. Then to cover such cases as may shade into larceny, as well as any new situation which may arise under changing modern conditions and not envisioned under the common law, it adds the words **steal or purloin** . . . . Stealing, having no common law definition to restrict its meaning as an offense, is commonly used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another, and deprives the owner of the rights and benefits of ownership, but may or may not involve the element of stealth usually attributed to the word **purloin**. . . . Thus, in any case involving larceny as defined by the common law, section 46 [18 USC § 99 (1940 ed)] would apply. Where the offense is embezzlement, or its nature so doubtful as to fall between larceny and embezzlement, it may be prosecuted under section 47 [18 USC § 100 (1940 ed)]."

The reference in Crabb v. Zerbst to 18 USC (1940 ed) § 99, the robbery and larceny statute then operative, suggests examination of its successor in today's code. For purpose of clarification, that section states that:

"Whoever shall rob another of any kind or description of personal property belonging to the United States, or shall feloniously take and carry away the same, shall be fined not more than $5,000, or imprisoned not more than ten years, or both."

The Reviser's Note to 18 USC § 641 makes no mention of it as a successor to that section. The present robbery statute is

in classification or punishment. Not one fits the congressional classification of the petty offense; each is, at its least, a misdemeanor, and if the amount involved is one hun-

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dred *or more dollars each is a felony.[29] If one crime without intent has been smuggled into a section whose dominant offenses do require intent, it was put in ill-

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18 USC § 2112, "Personal property of United States," providing that:

"Whoever robs another of any kind or description of personal property belonging to the United States, shall be imprisoned not more than fifteen years."

The Reviser's Note to that section recites that it is derived from § 99 of the 1940 Code, and "That portion of said section 99 relating to felonious taking was omitted as covered by section 641 of this title," which makes it clear that, notwithstanding the absence of any reference to 18 USC (1940 ed) § 99 in the Note to 18 USC § 641, the crime of larceny by a felonious taking and carrying away has been transported directly from the former into the latter.

18 USC (1940 ed) § 101 is the forerunner of that part of present § 641 dealing with receiving stolen property, and has no application to the problem at hand.

The history of § 641 demonstrates that it was to apply to acts which constituted larceny or embezzlement at common law and also acts which shade into those crimes but which, most strictly considered, might not be found to fit their fixed definitions. It is also pertinent to note that it renders one subject to its penalty who "knowingly converts to his own use" property of the United States. The word "converts" does not appear in any of its predecessors. 18 USC (1940 ed) § 82 is applicable to one who "take[s] for his own use . . . with intent to steal or purloin . . . ." 18 USC (1940 ed) § 87 uses the words "knowingly apply to his own use." Neither 18 USC (1940 ed) §§ 99, 100, nor 101 have any words resembling "knowingly converts to his own use." The 1948 Revision was not intended to create new crimes but to recodify those then in existence. We find no suggestions that a guilty intent was not a part of each crime now embodied in § 641.

[29] 18 USC §§ 1, 641.

fitting and compromising company. The Government apparently did not believe that conversion stood so alone

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when it *drew this one-count indictment to charge that Morissette "did unlawfully, wilfully and knowingly steal and convert to his own use."[30]

Congress, by the language of this section, has been at pains to incriminate only "knowing" conversions. But, at common law, there are unwitting acts which constitute conversions. In the civil tort, except for recovery of exemplary damages, the defendant's knowledge, intent, motive, mistake, and good faith are generally irrelevant.[31] If one takes property which turns out to belong to another, his innocent intent will not shield him from making restitution or indemnity, for his well-meaning may not be allowed to deprive another of his own.

Headnote 10

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[30] Had the indictment been limited to a charge in the words of the statute, it would have been defective if, in the light of the common law, the statute itself failed to set forth expressly, fully, and clearly all elements necessary to constitute the offense. United States v. Carll, 105 U.S. 611, 26 L ed 1135.

[31] Harker v. Dement (Md.) 9 Gill 7, 52 Am. Dec. 670 (1850); Baltimore & O.R. Co. v. O'Donnell, 49 Ohio St. 489, 32 NE 476, 21 LRA 117, 34 Am St Rep 579 (1892). The rationale underlying such cases is that when one clearly assumes the rights of ownership over property of another no proof of intent to convert is necessary. It has even been held that one may be held liable in conversion even though he reasonably supposed that he had a legal right to the property in question. Row v. Home Sav. Bank, 306 Mass 522, 29 NE2d 552, 131 ALR 160 (1940). For other cases in the same vein, see those collected in 53 Am Jur 852-854. These authorities leave no doubt that Morissette could be held liable for a civil conversion for his taking of the property here involved, and the instructions to the jury might have been appropriate in such a civil action. This assumes of course that actual abandonment was not proven, a matter which petitioner should be allowed to prove if he can.

Had the statute applied to conversions without qualification, it would have made crimes of all unwitting, inadvertent and unintended conversions. Knowledge, of course, is not identical with intent and may not have been

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the most apt words of limitation. But knowing conversion* requires more than knowledge that defendant was taking the property into his possession. He must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion. In the case before us, whether the mental element that Congress required be spoken of as knowledge or as intent, would not seem to alter its bearing on guilt. For it is not apparent how Morissette could have knowingly or intentionally converted property that he did not know could be converted, as would be the case if it was in fact abandoned or if he truly believed it to be abandoned and unwanted property.

Headnote 11

Headnote 12

It is said, and at first blush the claim has plausibility, that, if we construe the statute to require a mental element as part of criminal conversion, it becomes a meaningless duplication of the offense of stealing, and that conversion can be given meaning only by interpreting it to disregard intention. But here again a broader view of the evolution of these crimes throws a different light on the legislation.

It is not surprising if there is considerable overlapping in the embezzlement, stealing, purloining and knowing conversion grouped in this statute. What has concerned codifiers of the larceny type offense is that gaps or crevices have separated particular crimes of this general class and guilty men have escaped through the breaches. The books contain

a surfeit of cases drawing fine distinctions between slightly different circumstances under which one may obtain wrongful advantages from another's property. The codifiers wanted to reach all such instances. Probably every stealing is a conversion, but certainly not every knowing conversion is a stealing. "To steal means to *take away from one* in lawful possession without right with the *intention to keep wrongfully.*" (Italics added.) Irving Trust Co. v. Leff, 253 NY 359, 364, 171 NE 569.

Headnote 13

*[272]

Conversion, however, may be consummated without *any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use. Money rightfully taken into one's custody may be converted without any intent to keep or embezzle it merely by commingling it with with the custodian's own, if he was under a duty to keep it separate and intact. It is not difficult to think of intentional and knowing abuses and unauthorized uses of government property that might be knowing conversions but which could not be reached as embezzlement, stealing or purloining. Knowing conversion adds significantly to the range of protection of government property without interpreting it to punish unwitting conversions.

The purpose which we here attribute to Congress parallels that of codifiers of common law in England[32] and in the

[32] The Larceny Act of 1916, 6 & 7 Geo. V, ch 50, an Act "to consolidate and simplify the Law relating to Larceny triable on Indictment and Kindred Offenses" provides:

*[273]

States[33] and demonstrates that the serious problem *in

"1. For the purposes of this Act—

"(1) a person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof:

"Provided that a person may be guilty of stealing any such thing notwithstanding that he has lawful possession thereof, if, being a bailee or part owner thereof, he fraudulently converts the same to his own use or the use of any person other than the owner. . . ."

For the growth and development of the crime of larceny in England, see 2 Russell on Crime (10th ed, Turner, 1950), 1037-1222, from which the material above was taken.

[33] NY Penal Law, § 1290, defines larceny as follows:

"A person who, with the intent to defraud or deprive another of the use and benefit of property or to appropriate the same to the use of the taker, or of any other person other than the true owner, wrongfully takes, obtains or withholds, by any means whatever, from the possession of the true owner or of any other person any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind, steals such property and is guilty of larceny."

The same section provides further that it shall be no defense to a prosecution that:

"2. The accused in the first instance obtained possession of, or title to, such property lawfully, provided he subsequently wrongfully withheld or appropriated such property to his own use or the use of any person not entitled to the use and benefit of such property. . . ."

The Historical Note to that section discloses that it represents an attempt to abolish the distinctions between kinds of larcenies. Laws 1942, ch 732 § 1, provided:

"It is hereby declared as the public policy of the state that the best interests of the people of the state will be served, and confusion and injustice avoided, by eliminating and abolishing the distinctions which have hitherto differentiated one sort of theft from another, each of which, under section twelve hundred and ninety of the penal law, was denominated a larceny, to wit: common law larceny by asportation, common law larceny by trick and device, obtaining property by false pretenses, and embezzlement."

drafting such a statute is to avoid gaps and loopholes between offenses. It is significant that the English and State codifiers have tried to cover the same type of conduct that we are suggesting as the purpose of Congress here, without, however, departing from the common-law tradition that these are crimes of intendment.

Headnote 14

We find no grounds for inferring any affirmative instruction from Congress to eliminate intent from any offense with which this defendant was charged.

III.

As we read the record, this case was tried on the theory that even if criminal intent were essential its presence (a) *[274] should be decided by the court (b) as a presumption *of law, apparently conclusive, (c) predicated upon the isolated act of taking rather than upon all of the circumstances. In each of these respects we believe the trial court was in error.

Headnote 15

Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury. State court authorities cited to the effect that intent is relevant in larcenous crimes are equally emphatic and uniform that it is a jury issue. The settled practice and its reason are well stated by Judge Andrews in People v. Flack, 125 NY 324, 334, 26 NE 267, 11 LRA 807:

"It is alike the general rule of law and the dictate of natural justice that to constitute guilt there must be not only a wrongful act, but a criminal intention. Under our system (unless in exceptional cases), both must be found

by the jury to justify a conviction for crime. However clear the proof may be, or however incontrovertible may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury. Jurors may be perverse; the ends of justice may be defeated by unrighteous verdicts, but so long as the functions of the judge and jury are distinct, the one responding to the law, the other to the facts, neither can invade the province of the other without destroying the significance of trial by court and jury. . . ."

Headnote 16

It follows that the trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act. It often is tempting to cast in terms of a "presumption" a conclusion which a court thinks probable from given facts. The Supreme Court of Florida, for example, in a larceny case, from selected circumstances which are

*[275]

present in this case, has *declared a presumption of exactly opposite effect from the one announced by the trial court here: ". . . But where the taking is open and there is no subsequent attempt to conceal the property, and no denial, but an avowal, of the taking a strong presumption arises that there was no felonious intent, which must be repelled by clear and convincing evidence before a conviction is authorized. . . ." emp v. State, 146 Fla 101, 104, 200 So 368, 369.

We think presumptive intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient

of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect.[34] In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary. Even congressional power to facilitate convictions by substituting presumptions for proof is not without limit. Tot v. United States, 319 US 463, 87 L ed 1519, 63 S Ct 1241.

Headnote 17

Headnote 18

Moreover, the conclusion supplied by presumption in this instance was one of intent to steal the casings, and it was based on the mere fact that defendant took them. The court thought the only question was, "Did he intend

*[276]

*to take the property?" That the removal of them was a conscious and intentional act was admitted. But that isolated fact is not an adequate basis on which the jury should find the criminal intent to steal or knowingly convert, that is, *wrongfully* to deprive another of possession of property. Whether that intent existed, the jury must determine, not only from the

Headnote 19

[34] Cf Morgan, Instructing the Jury Upon Presumptions and Burden of Proof, 47 Harv L Rev 59; Morgan, Some Observations Concerning Presumption, 44 Harv L Rev 906.

act of taking, but from that together with defendant's testimony and all of the surrounding circumstances.

Headnote 20

Of course, the jury, considering Morissette's awareness that these casings were on government property, his failure to seek any permission for their removal and his self-interest as a witness, might have disbelieved his profession of innocent intent and concluded that his assertion of a belief that the casings were abandoned was an after-thought. Had the jury convicted on proper instructions it would be the end of the matter. But juries are not bound by what seems inescapable logic to judges. They might have concluded that the heaps of spent casings left in the hinterland to rust away presented an appearance of unwanted and abandoned junk, and that lack of any conscious deprivation of property or intentional injury was indicated by Morissette's good character, the openness of the taking, crushing and transporting of the casings, and the candor with which it was all admitted. They might have refused to brand Morissette as a thief. Had they done so, that too would have been the end of the matter.

Reversed.

Mr. Justice *Douglas* concurs in the result.

Mr. Justice *Minton* took no part in the consideration or decision of this case.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 116

NORMAN H. HELMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (Pet. 15-22) is reported at 340 F. 2d 15.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1964, and a petition for rehearing was denied on March 8, 1965 (Pet. 23-24; R. 591, 626). On March 26, 1965, Mr. Justice Black extended the time for filing a petition for certiorari to

May 7, 1965, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court committed plain error in instructing the jury that it might infer that petitioner intended the natural and probable consequences of his conscious acts.

2. Whether the district court erred in failing to instruct the jury that it must not consider evidence of items of unreported income not listed in the bill of particulars, where there was no such evidence.

3. Whether petitioner was deprived of a fair trial by the prosecutor's comments during summation to the jury.

STATUTE INVOLVED

Internal Revenue Code of 1954:

> SEC. 7206. FRAUD AND FALSE STATEMENTS.
>
> Any person who—
>
> (1) *Declaration under penalties of perjury.*
>
> Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; * * *
>
> * * * * *
>
> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or

imprisoned not more than 3 years, or both, together with the costs of prosecution.

(26 U.S.C. 1958 ed., Sec. 7206.)

STATEMENT

On February 27, 1963, petitioner was indicted in the United States District Court for the Eastern District of Texas, Beaumont Division, on two counts of willfully and knowingly making and subscribing individual income tax returns (for the years 1958 and 1959), which were verified by written declarations that they were made under the penalties of perjury, and which petitioner did not believe to be true and correct as to every material matter, in violation of Section 7206(1) of the Internal Revenue Code of 1954 (26 U.S.C. 7206(1)). Each count of the indictment alleged that petitioner knowingly understated his gross income on his returns (R. 2-3). The bill of particulars stated, *inter alia*, that the government intended to rely on proof of specific items of unreported income, principally "omitted gross income from marble table [pinball machine] collections for the calendar years 1958 and 1959" (R. 36) and unreported interest income received by petitioner during the same years from one Fontenot (R. 37).

After a jury trial petitioner was found guilty on both counts (R. 52). He was fined $2,500 on each count and sentenced to 18 months imprisonment on Count I and to two years on Count II (R. 53-54). The latter prison sentence was suspended and petitioner was placed on probation for five years (R. 54).

The evidence supporting the jury's verdict can be summarized as follows:

During the years 1958 and 1959 petitioner was the sole owner of the Jefferson Novelty Co., which owned and operated juke boxes, pinball machines (often referred to in the record and the petition as "marble tables") and shuffle boards (R. 87, 96-97). Petitioner's employee Borel removed the coins from the machines at least once a week (R. 107, 115, 243). By reading the meters inside each machine Borel ascertained how much each "location owner" had paid out in cash for "free games" (R. 116-118, 224-225, 229-230). Borel then paid 40% of the net receipts to the location owner and kept 60% for petitioner (R. 117-119, 176, 245-246).

Acting under petitioner's instruction, Borel customarily prepared two sets of tickets at the time of each collection at many of the locations. One set, showing the true amounts collected, would be initialed by the location owner; the other, showing fictitious lesser amounts, would be signed by the location owner, who would retain a copy of the latter (false) ticket only (R. 119-139, 191, 245-246, 257, 309-330, 344-345, 359-360, 391). The amounts of money shown on the false tickets were simply made up by Borel "out of [his] head" (R. 119-121, 176), and a number of location owners testified to the fact that their 40% share of the weekly collections ranged from $8 to $50 higher than the amounts shown on these tickets (R. 275, 310, 344-345, 353-354, 361, 371, 377, 386). The collection tickets showing the true amounts

also showed the meter readings of the pinball machines; the false tickets did not show any meter readings (R. 127-139, 178-179, 445-447).

Petitioner's bookkeepers entered the lesser (false) amounts of income on petitioner's books (R. 227-228, 472-473), and these amounts were put on his income tax returns (R. 80, 85-86, 472, 481-482). Upon audit petitioner furnished the Treasury agents with the fictitious tickets (which agreed with petitioner's books) (R. 445-447, 466-468, 472-480, 485-490).

Although petitioner told the Treasury agents at the outset of their investigation that prior to 1960 he had not charged interest on cash loaned by him to individuals, the proof showed that during 1959 he received $640 in interest payments from Fontenot which was not reported on his tax return (R. 264-274, 463-464, 484-485).

ARGUMENT

1. There is no substance to petitioner's main contention (Pet. 9-10), that the trial judge committed plain error in instructing the jury as follows (R. 572-573):

> It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So, unless the contrary appears from the evidence, the jury may draw the inference that the defendant intended all of the consequences which one standing in like circumstances and possessing like knowledge would reasonably have expected to result from any act knowingly

> done or knowingly omitted by the defendant. In determining this issue of intent the jury is entitled to consider any statement or acts done or omitted by the defendant, and all facts and circumstances in the evidence which may aid in its determination of the state of his mind.

This instruction eliminated the only two faults in the instructions in three of the cases relied upon by petitioner, *Berkovitz* v. *U.S.*, 213 F. 2d 468 (C.A. 5); *Wardlaw* v. *United States*, 203 F. 2d 884 (C.A. 5th); *Bloch* v. *United States*, 221 F. 2d 786 (C.A. 9th).[1] First, it deleted any reference to a *presumption* of a guilty intent; it stated only what inferences the jury "may draw" and even limited these by adding "unless the contrary appears from the evidence." Second, the instruction did not state that wilfulness could even be inferred from the mere omission of items of gross income. The first and third sentences of the instruction simply repeated what has been, for many years, the standard instruction on circumstantial evidence of intent—that a man generally intends the normal consequences of his acts, an instruction which is as necessary and proper in a prosecution for tax evasion as in any other case. The normal consequence intended in omitting large amounts of income from a tax return is that the income will not be taxed and if, considering all the evidence in the case, the jury is satisfied that the taxpayer knew when he

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[1] The *Bloch* case was, moreover, later overruled *sub silentio* by *Brown* v. *United States*, 222 F. 2d 293, 298 (C.A. 9th). See *Herzog* v. *United States*, 226 F. 2d 561, 567 (C.A. 9th), opinion adhered to, 235 F. 2d 664, 668, certiorari denied, 352 U.S. 844.

filed the return that the items were taxable and that they were not being reported, it may infer the existence of the element of wilfulness. The second sentence of the instruction, though possibly awkward, certainly does not amount to reversible error in the absence of any objection at the trial. *Sherwin* v. *United States*, 320 F. 2d 137 (C.A. 9th), certiorari denied, 375 U.S. 964; *United States* v. *Denton*, 336 F. 2d 785, 788 (C.A. 6th).

It is true that in *Mann* v. *United States*, 319 F. 2d 404, certiorari denied, 375 U.S. 986, the Fifth Circuit reversed a conviction for income tax evasion on the ground that the instruction in question constituted plain error, but in that case "The sole defense" was lack of "wilfulness" (319 F. 2d at 410), and proof of that element of the offense, as well as its submission to the jury under proper judicial guidance, was the "vital aspect of the case" (*id.*). In the case at bar, as the court below recognized (Pet. 20-21) the real issue before the jury was not wilfulness but whether petitioner had in fact received the unreported income testified to by the government's witnesses, and which he has always claimed he did not receive (R. 463, 545-558). A conflict between holdings of different Fifth Circuit panels, even if it existed, would hardly be a basis for the granting of certiorari, and it must be assumed from the denial of the petition for rehearing *en banc* (R. 626) that the Fifth Circuit was satisfied that there is no such conflict.[2]

[2] We see no similarity between the case at bar and the cases in this Court (Pet. 9-10) with which it is said to be in

2. Also without merit is the argument (Pet. 10-11) that the district judge erred in failing to tell the jury that it must not consider evidence of unreported income items not listed in the bill of particulars. There was no such evidence; hence an instruction on the subject could have resulted only in confusing the jury.[3]

3. Nor is there substance to the argument (Pet. 11-12) that the court below erred in holding that the trial judge did not abuse his discretion in overruling an objection to the prosecutor's argument (Pet. 8) which was made in "fair response to the argument of defendant's counsel" (Pet. 22). The cases relied upon by petitioner bear no factual resemblance to the instant case.

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conflict. For example, in the first case mentioned, *Morissette* v. *United States*, 342 U.S. 246, this Court reversed a conviction on the ground that wilfulness was a question of fact which should have been submitted to the jury, rather than determined by the trial judge as a matter of law. There is nothing of that nature in the instant case.

[3] *People* v. *Davis*, 269 Ill. 256, 110 N.E. 9, relied upon by petitioner (Pet. 11), involved an instruction under which the jury might have considered evidence other than that spelled out in the bill of particulars. In the case at bar all of the items of unreported income proved at the trial (including the interest paid to petitioner by Fontenot) *were* included in the bill of particulars (R. 37).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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JUNE 1965.

END